

United States
Circuit Court of Appeals
For the Ninth Circuit.

SACRAMENTO VALLEY ELECTRIC RAIL-
ROAD COMPANY, a Corporation,
Plaintiff in Error,

VS.

TAGGART ASTON,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Northern District of California,
Second Division.

Filed

DEC 10 1915

F. D. Monckton,
Clerk.

No. 2670

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Circuit Court of Appeals
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Answer.....	6
Assignment of Errors.....	91
Certificate of Clerk U. S. District Court to Transcript of Record.....	95
Complaint.....	1
Engrossed Bill of Exceptions.....	21
Exceptions, Engrossed Bill of.....	21
Findings of Fact and Conclusions of Law.....	14
Judgment of Findings.....	19
Letter, September 15, 1913—Donohoe to Wilsey.....	47
Letter, September 15, 1913—Donohoe to Wilsey.....	48
Letter, September 18, —3—W. J. W. to Donohoe.....	50
Letter, September 18,—3—Wilsey to Donohoe..	51
Letter, September 22, 1913—Aston to Donohoe..	34
Letter, September 22, 1913—Aston to Donohoe..	26
Letter, October 1, 1913—Donohoe to Aston....	27
Letter, October 2, 1912—Aston to Donohoe....	28
Letter, November 11, 1913—Aston to Donohoe..	36
Letter, November 14, 1913—Aston to Donohoe..	37
Letter, November 14, 1913—Aston to Sisson....	39
Letter, November 19, 1913—Sisson to Aston....	38

Index.	Page
Letter, December 24, 1913—Donohoe to Aston..	40
Letter, December 24, 1913—Donohoe to Cox....	42
Order Modifying Judgment.....	21
Order of Railroad Commission, August 13, 1912.....	57
Order of Railroad Commission, September 27, 1913.....	67
Order of Railroad Commission, December 30, 1913.....	83
Order Settling and Allowing Bill of Excep- tions.....	90
Stipulation as to Bill of Exceptions.....	91
Stipulation Under Rule 23.....	97
Telegram, September 22, 1913—Donohoe to Wilsey.....	54
Telegram, September 22, 1913—Wilsey to Don- ohoe.....	55
Telegram, September 23, 1913—Donohoe to Wil- sey.....	55
Telegram, September 23, 1913—Wilsey to Donohoe.....	56
Telegram, September 24, 1913—Aston to Wil- sey.....	30
Telegram, September 26, 1913—Aston to Wil- sey.....	31
TESTIMONY ON BEHALF OF PLAIN- TIF:	
TAGGART, ASTON....	23
TESTIMONY ON BEHALF OF DEFEND- ANT:	
HUSTON, A. C.....	56

*In the District Court of the United States for the
Northern District of California.*

TAGGART ASTON,

Plaintiff,

vs.

SACRAMENTO VALLEY ELECTRIC RAIL-
ROAD COMPANY, a Corporation,
Defendant.

Complaint.

The plaintiff for a cause of action against the defendant complains and alleges;

1. That the plaintiff is an alien, was born in foreign parts, and is, and at all the times hereinafter mentioned was, and now is, a citizen of the Kingdom of Great Britain and a subject of the King of Great Britain; and is and was, at all the times hereinafter mentioned, a resident and inhabitant of the State of California, residing within the Northern District thereof, at Berkeley in the County of Alameda in said State.

2. That the defendant is, and at all the times hereinafter mentioned was, a corporation organized and existing under the laws of the State of California with its principal place of business at the City and County of San Francisco, State of California and was at all of said times and now is a citizen of the United States of America and a citizen and resident of said State of California and resident and inhabitant of said Northern Judicial District of California.

tract to the defendant and tendered also the services of the said Wilsey in the matter of the presentation of said report to said financial interests both in England and upon the continent of Europe, but that each and all of said tenders and offers to perform were by the defendant refused; that ever since the 1st day of October, 1913, the defendant herein has wholly failed, neglected and refused, and still wholly fails, neglects and refuses to perform upon its part the terms of the aforesaid contract between plaintiff and defendant to plaintiff's damage in the sum of Thirty-three Hundred Fifty and 00/100 (\$3,350.-00) Dollars.

And for a second and further cause of action against the defendant herein, plaintiff complains and alleges. [3]

1. That the plaintiff is an alien, was born in foreign parts, and is, and at all the times hereinafter mentioned was, and now is, a citizen of the Kingdom of Great Britain and a subject of the King of Great Britain; and is and was, at all the times hereinafter mentioned, a resident and inhabitant of the State of California, residing within the Northern District thereof, at Berkeley in the County of Alameda in said state.

2. That the defendant is, and at all the times hereinafter mentioned was, a corporation organized and existing under the laws of the State of California with its principal place of business at the City and County of San Francisco, State of California and was at all of said times and now is a citizen of the United States of America and a citizen and

resident of said State of California and resident and inhabitant of said Northern Judicial District of California.

3. That at all the times herein alleged, Taggart Aston was, and is now, a consulting civil engineer, engaged in the practice of his profession in the City and County of San Francisco and the State of California.

4. That between the 22d day of September, 1913, and the 23d day of January, 1914, the said Taggart Aston performed professional services as a civil engineer for the defendant at its special instance and request in gathering data and preparing reports showing the estimates of the cost of construction of the defendant's proposed railroad from Red Bluff to Dixon and the amount of the possible traffic hereof and the amount of the possible financial returns therefrom to be received by the defendant from the maintenance and operation of said railroad.

5. That said services were reasonably worth the sum of Three Thousand Five Hundred (3,500) Dollars; that said sum has not been paid nor any part thereof, except the sum of One Hundred Fifty (150) Dollars, and that there is now due and [4] owing from defendant to plaintiff on account of said services the sum of Three Thousand Three Hundred Fifty (3350) Dollars.

WHEREFORE, Plaintiff demands judgment in

the sum of \$3,350.00 and for his costs and disbursements of this action.

JACOB M. BLAKE,
Attorney for Plaintiff.

JAMES L. CRITTENDEN,
Of Counsel for Plaintiff. [5]

[Endorsed]: Filed May 6, 1914. [6]

[Title of Court and Cause.]

Answer.

Now comes the defendant and answering the complaint on file herein, admits, avers and denies as follows:

1. That as to the allegation contained in paragraph 1, of the first cause of action, that "plaintiff is an alien, was born in foreign parts, and is, and at all the times hereinafter mentioned was, and now is, a citizen of the Kingdom of Great Britain and a subject of the King of Great Britain," defendant has no knowledge, information or belief sufficient to enable it to answer the said allegation, and therefore, and for that reason, and on that ground, denies that plaintiff is an alien, and is or was at all the times in the said complaint mentioned, or now is, a citizen of the Kingdom of Great Britain or a subject of the King of Great Britain.

2. Denies that on or about the 22d day of September, 1913, or at any other time, or at all, the defendant made or entered into a contract or agreement with the plaintiff wherein or whereby it employed plaintiff as a consulting civil engineer, or

otherwise, to gather data or prepare a report showing the estimates of the cost of construction of the defendant's proposed railroad project in California, and of the amount of the possible traffic and of the probable financial returns therefrom to be received [9] by the defendant from the maintenance and operation of its proposed railroad from Red Bluff investigation of its proposed route in the field, and to examine all traffic conditions and all financial to Dixon, in the State of California from an actual returns to be developed by the construction of defendant's proposed railroad in California as compared with the known earnings of other similar lines of railroad in the Sacramento Valley in said State; denies that the said defendant, on the said 22d day of September, 1913, or at any other time, or at all, made or entered into any contract of any kind or character with the said plaintiff, or any contract or agreement to make any report or gather any data upon any of the points or subjects referred to in said complaint, or on any other subject, or at all; denies that at the time of entering into said contract, or at any other time, or at all, it was understood or agreed upon the part of the plaintiff herein that he would cause the said report to be presented to financial interests abroad,—that is to say, to parties in England or upon the continent of Europe who deal in stocks and bonds of American railroad projects, by one W. J. Wilsey; denies that said plaintiff had any contract or agreement, or that it was understood or agreed that he was to prepare any report of any kind or character for defendant, or that he was to

present any report to any financial interests in England, or in any other place, by one W. J. Wilsey, or by any other person; denies that in or by the terms of said alleged contract of employment, or by the terms of any contract, or otherwise, or at all, the defendant promised or agreed to pay plaintiff for his services in furnishing any report, the sum of Three Thousand Five Hundred (\$3,500) Dollars, as follows, to wit: Seven Hundred Fifty (\$750) Dollars to be paid on September 27th, 1913; Seven Hundred Fifty (\$750) Dollars on or before October 13th, 1913; Five Hundred (\$500) Dollars on November 3d, 1913; Five Hundred (\$500) Dollars on November 17th, 1913, provided said [10] report was completed by that time, and if not, upon the completion thereof; denies that said defendant agreed or promised to pay plaintiff the sum of Three Thousand Five Hundred (\$3,500) Dollars, or any other sum; denies that said defendant agreed to pay the said plaintiff Seven Hundred Fifty (\$750) Dollars, or any other sum, on September 27th, 1913, or at any other time, or at all, denies that defendant agreed or promised to pay plaintiff Seven Hundred Fifty (\$750) Dollars, or any other sum, on or before October 13th, 1913, or at any other time, or at all, denies that said defendant agreed or promised to pay plaintiff the sum of Five Hundred (\$500) Dollars, or any other sum, on November 3d, 1913, or at any other time, or at all; denies that said defendant agreed or promised to pay plaintiff the sum of Five Hundred (\$500) Dollars, or any other sum, on November 17th, 1913, or at any other time, or at all;

denies that said defendant agreed or promised to pay the said plaintiff any sum whatever, whether said report referred to in said complaint was completed by November 17th, 1913, and if not upon the completion thereof; denies that said defendant employed the said plaintiff to prepare any report at any time, or at all, or agreed to pay him any sum whatever, at any time, or at all, for any report he might prepare; denies that the balance on said sum of Three Thousand, Five Hundred (\$3,500) Dollars, amounting to One Thousand (\$1,000) Dollars, or any other sum; was agreed to be paid when said defendant should hear from the said Wilsey from London that the matter of the presentation of said report was receiving favorable consideration; denies that said defendant agreed or promised to pay to said plaintiff the sum of One Thousand (\$1,000) Dollars as a balance on said alleged sum of Three Thousand Five Hundred (\$3,500) Dollars, or otherwise, or at all; denies that [11] there was any contract or agreement of any kind or character whereby said defendant agreed to pay said plaintiff said sum of One Thousand Dollars, or any other sum, under the terms or conditions alleged in the complaint, or any other terms or conditions denies that said defendant, at any time, or at all, made any agreement to pay said sum of Three Thousand, Five Hundred Dollars, or any part thereof, to the said plaintiff, as alleged in said complaint, or otherwise, or at all; denies that on the 23d day of September, 1913, or at any other time, plaintiff entered upon the performance of said contract, or any contract,

made with said defendant; denies that thereafter, and on or about the first day of October, 1913, or at any other time, or at all, or without fault on the part of the plaintiff, or while plaintiff was engaged in the performance of said contract, the defendant herein repudiated the said alleged contract with plaintiff, or any contract with plaintiff, or refused to proceed further in the performance of said contract on his part, as aforesaid, denies that said plaintiff had any contract with the said defendant; denies that the said defendant, by or through its president, one Charles L. Donohoe, referred to in the complaint as Charles L. Donohue, gave written or any notice to plaintiff to refrain from the preparation of said report; denies that prior to the alleged repudiation of the said contract by defendant, or at any other time, or at all, said defendant accepted the performance thereof on the part of plaintiff, as aforesaid; denies that said defendant paid plaintiff on account of said contract the sum of One Hundred and Fifty (\$150) Dollars, denies that said defendant has repudiated any contract with plaintiff, for the reason that said defendant has not at any time entered into any contract with plaintiff, denies that thereafter, at various times between said first day of October and the 23d day of January, 1914, or at [12] any other time, or at all, plaintiff offered to perform or tendered on his part the performance of said contract to the defendant or tendered also the services of said Wilsey in the matter of the presentation of said report to said financial interests, both in England and upon the continent of Europe; de-

denies that each or all of said tenders or offers to perform were by the defendant refused; denies that ever since the first day of October, 1913, or at any other time, or at all, the defendant herein has wholly or at all failed or neglected or refused, or still wholly or at all fails or neglects or refuses to perform upon its part the terms of any contract between plaintiff and defendant, to plaintiff's damage in the sum of Three Thousand, Three Hundred and Fifty (\$3,350) Dollars, or any other sum.

II.

Answering the second cause of action in the said complaint alleged, defendant admits, avers and denies as follows:

1. That as to the allegation contained in paragraph 1, of the second cause of action, that "plaintiff is an alien, was born in foreign parts, and is, and at all the times hereinafter mentioned was, and now is, a citizen of the Kingdom of Great Britain and a subject of the King of Great Britain," defendant has no knowledge, information or belief sufficient to enable it to answer the said allegation, and therefore, and for that reason, and on that ground, denies that plaintiff is an alien, and is or was at all the times in the said complaint mentioned, or now is, a citizen of the Kingdom of Great Britain or a subject of the King of Great Britain.

2. Denies that between the 22d day of September, 1913, and the 23d day of January, 1914, or at any other time, or at all, the said plaintiff performed professional or any service [13] as a civil engineer, or otherwise, for the defendant, at its special

instance or request, or at all, in gathering data or preparing reports showing the estimates of the cost of construction of the defendant's proposed railroad from Red Bluff to Dixon, or the amount of the possible traffic thereof, or the amount of the possible financial returns therefrom to be received by the defendant, from the maintenance or operation of said railroad; denies that between the said dates, or at any other time, or at all, the said plaintiff rendered or performed any services of any kind or character for the said defendant.

3. Denies that said alleged services were or are reasonably worth the sum of Three Thousand, Five Hundred (\$3,500) Dollars, or any other sum; admits that said defendant has not paid said sum or any other sum; denies that said defendant has paid plaintiff the sum of One Hundred and Fifty (\$150) Dollars, denies that there is now, or was at any other time, or at all, due or owing from defendant to plaintiff an account of said alleged services, or otherwise, or for any services, the sum of Three Thousand, Three Hundred and Fifty (\$3,350) Dollars, or any other sum.

III.

Further answering the said complaint, defendant avers as follows:

1. That the said defendant is, and was at all the times hereinafter mentioned, a corporation duly and legally organized under the laws of the State of California, for the purpose of constructing a railroad to be operated by electric or other motive power, except steam.

2. That under and by virtue of the laws of the State of California, the said defendant was at all of the times mentioned in the said complaint, and now is, subject to the jurisdiction [14] of the Railroad Commission of the State of California, and at said time was and is only authorized to enter into such contracts and to expend its funds for such purposes as were and are directed and ordered by said Railroad Commission of the State of California.

3. That at all the times alleged in said complaint the said defendant was not authorized and did not have legal authority or any capacity, right or power to make or enter into any contract with said plaintiff, as alleged in said complaint, or to employ said plaintiff to render any of said services, or to agree to pay the said plaintiff any of the sums alleged in said complaint; alleges that under and by virtue of the orders of the Railroad Commission of the State of California governing and controlling the disbursement and expenditure of the funds of the said defendant, none of said funds can be legally applied to the payment of the said obligations alleged in said complaint, or either of them.

4. Alleges that the said defendant had no legal capacity or authority to make or enter into the said contract alleged in said complaint, or to make or enter into any of the agreements alleged in said complaint.

WHEREFORE, the defendant prays that plaintiff take nothing by said complaint, and that it have judgment for its costs; and for such other and fur-

ther relief as may be meet and proper.

ARTHUR C. HUSTON,

Attorney for Defendant. [15]

[Endorsed]: Filed May 11, 1914. [16]

[Title of Court and Cause.]

Findings of Fact and Conclusions of Law.

The above-entitled cause coming on regularly to be heard in the above-entitled Honorable Court, before the Honorable William C. Van Fleet, the judge thereof on the 15th day of September, 1914, the plaintiff appearing by Jacob M. Blake, Esq., his attorney, and the defendant appearing by Arthur C. Huston, A. P. Black and George Clark, Esqs., its attorneys, and a trial by jury having been duly waived in writing, and said cause having been duly and regularly tried by said Court and by it ordered submitted, and the said Court on April 2, 1915, having duly rendered its decision therein, the Court now makes the following findings of fact:

1. That the plaintiff is an alien, was born in foreign parts and is, and at all the times mentioned in the complaint was, a citizen of the Kingdom of Great Britain and a subject of the King of Great Britain; that the plaintiff is and was, at all the times mentioned in said complaint, a resident and inhabitant of the State of California, and resided in the Northern District thereof at Berkeley in the County of Alameda in said State.

2. That the defendant is, and at all the times mentioned in the complaint was, a railroad corporation duly incorporated, organized and existing un-

der and by virtue of the laws of California for the purpose of owning, controlling and managing a railroad [19] for compensation within the said State; that said defendant was incorporated on May 4, 1912, and became, was and is a public utility as defined in the Public Utilities Act of the State of California; that the said defendant is, and at all the times mentioned in the complaint was, a citizen of the United States of America, and a citizen and resident of the said state of California, and a resident and inhabitant of the Northern Judicial District, with its principal place of business at the City and County of San Francisco in said state.

3. That on or about the 22d day of September, 1913, the defendant made and entered into a contract and agreement with the plaintiff wherein and whereby it employed the plaintiff as a consulting civil engineer to gather data and prepare a report showing the estimates of the cost of construction of the defendant's proposed railroad project in California, and of the amount of possible traffic, and of the probable financial returns therefrom to be received by the defendant from the maintenance and operation of its proposed railroad from Red Bluff to Dixon in the State of California, from an actual investigation of its proposed route in the field, and an examination of traffic conditions and of financial returns to be developed by the construction of defendant's proposed railroad in California as compared with the known earnings of other similar lines of railroad in the Sacramento Valley in said State; that at the time of entering into said contract, it was

understood and agreed upon the part of the plaintiff that he would cause the said report to be presented to financial interests abroad, that is to say; to parties in England or upon the continent of Europe who deal in the stocks and bonds of American railroad projects, by one W. J. Wilsey; that in and by the terms of said contract of employment as aforesaid, the defendant [20] promised and agreed to pay plaintiff for his services in furnishing said report, the sum of Three Thousand Five Hundred (\$3,500) Dollars as follows, to wit: Seven Hundred Fifty (750) Dollars to be paid on September 27th, 1913; Seven Hundred Fifty (750) Dollars on or before October 13th, 1913; Five Hundred (500) Dollars on November 3d, 1913; Five Hundred (500) Dollars on November 17, 1913, provided said report was completed by that time and if not, upon the completion thereof; and the balance of said whole sum of Thirty-Five Hundred (3,500) Dollars, amounting to One Thousand (1,000) Dollars to be paid when said defendant should hear from the said Wilsey from London, that the matter of the presentation of said report was receiving favorable consideration.

4. That said defendant never heard from the said Wilsey from London, that the presentation of said report upon the defendant's railroad project in California was receiving favorable consideration.

5. That on or about the 23d day of September, 1913, plaintiff entered upon the performance of his said contract with the defendant as aforesaid, and that thereafter and on or about the 1st day of Oc-

tober, 1913, and without fault on the part of the plaintiff, and while plaintiff was engaged in the performance of his said contract, the defendant herein repudiated its said contract with the plaintiff, and refused to proceed further in the performance of said contract upon its part, and by and through its president, one Charles L. Donohue, gave written notice to plaintiff to refrain from the preparation of said report; that prior to the repudiation of said contract by the defendant as aforesaid, the defendant accepted the performance thereof on the part of the plaintiff herein as aforesaid, and paid the plaintiff on account of said contract the sum of One Hundred Fifty (150) Dollars. [21]

6. That thereafter at various times between said first day of October, 1913, and the 23d day of January, 1914, the plaintiff offered to perform, and tendered upon his part, the performance of said contract to the defendant, and tendered also the services of the said Wilsey in the matter of the presentation of said report to said financial interests both in England and upon the continent of Europe, but that each and all of said tenders and offers to perform were by the defendant refused; and that ever since the first day of October, 1913, the defendant herein has wholly failed, neglected and refused, and still wholly fails, neglects, and refuses to perform upon its part the terms of the aforesaid contract with the plaintiff to the damage of the plaintiff in the sum of Twenty Three Hundred and Fifty (2,350) Dollars.

7. That it is not true, as alleged in the defendant's answer, that, under and by virtue of the laws

of the State of California, or by any other law or laws, the defendant was at all the times mentioned in the complaint, or now is, under the jurisdiction of the Railroad Commission of California to the extent that it was, or is, only authorized to enter into such contracts and to expend its funds for such purposes as were and are directed by the Railroad Commission of California.

8. That it is not true, as alleged in the defendant's answer, that, at all the times alleged in plaintiff's complaint, or at any other time, the defendant was not authorized and did not have the legal authority, or any capacity, right or power to make or enter into any contract with the plaintiff, or to employ plaintiff to render any of said services, or to pay to the said plaintiff any of the sums alleged in plaintiff's complaint.

9. That it is not true, as alleged in the defendant's answer, that, under and by virtue of the orders of the Railroad [22] Commission of the State of California governing and controlling the disbursement and expenditure of the funds of said defendant, none of said funds could be legally applied to the payment of said obligations alleged in plaintiff's complaint, or to any of them.

10. That it is not true, as alleged in the defendant's answer that the said defendant had no legal capacity or authority to make or enter into said contract, as alleged in the first cause of action in said complaint, or to make or enter into any of the agreements alleged in said complaint.

From the foregoing Findings of Fact, the Court

now makes the following CONCLUSIONS OF LAW:

1. That the plaintiff is entitled to have and recover from the defendant in the above-entitled action the sum of Twenty Three Hundred and Fifty (2,350) Dollars, with interest thereon from the first day of October, 1913, at the rate of seven per cent per annum, together with the amount of his legal costs and disbursements therein, and judgment is hereby ordered entered therefor, with a ten days stay of execution.

Dated at San Francisco this 10th day of May, 1915.

WM. C. VAN FLEET,
District Judge.

Received copy of the within findings this May 10, 1915.

BLACK & CLARK,
Attys. for Dft.

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,759.

TAGGART ASTON,

Plaintiff.

vs.

SACRAMENTO VALLEY ELECTRIC RAIL-
ROAD COMPANY, a Corporation,

Defendant.

Judgment of Findings.

This cause having come on regularly for trial upon

the 15th day of September 1914, before the Court sitting without a jury, a trial by jury having been specially waived by stipulation filed herein; Jacob M. Blake, Esq., appearing as attorney for plaintiff and George Clark, Esq., appearing as attorney for defendant and the trial having been proceeded with on the 16th, 17th and 22d days of September, 1914, and evidence oral and documentary upon behalf of the respective parties having been introduced and closed and the cause having been submitted to the Court for consideration and decision, and the Court after due deliberation having filed its findings in writing and ordered that judgment be entered herein in accordance therewith:

Now therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that Taggart Aston, plaintiff, do have and recover of and from Sacramento Valley Electric Railroad Company, a corporation, defendant, the sum of Two Thousand Six Hundred Fourteen and 58/100 (\$2,614.58) Dollars, together with his costs herein expended taxed at \$——.

Judgment entered May 10, 1915.

WALTER B. MALING,

Clerk. [24]

[Seal] A True Copy, ATTEST:

WALTER B. MALING,

Clerk. [25]

At a stated term, to wit, the March term, A. D. 1915, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Friday, the 25th day of June, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,759.

TAGGART ASTON,

vs.

SACRAMENTO VALLEY ELECTRIC RAIL-
ROAD CO.

Order Modifying Judgment.

Upon motion of J. M. Blake, Esq., it was ordered that plaintiff's motion to vacate judgment and modify and amend findings be withdrawn. Defendant's petition for a new trial, heretofore heard and submitted, being now fully considered, it is ordered that the judgment herein be and the same is hereby modified by striking therefrom all allowance of interest prior to the date of the entry of the judgment; and that the petition for new trial be and the same is hereby denied. [26a]

[Title of Court and Cause.]

Engrossed Bill of Exceptions.

BE IT REMEMBERED that the above-entitled cause came on for trial in the above-entitled court

on the 15th day of September, 1914, before the Honorable William C. Van Fleet, District Judge, presiding, the plaintiff appearing by his attorney Jacob M. Blake, Esq., and defendant appearing through its attorneys A. C. Huston, Esq., and Messrs. Black & Clark. A jury was empanelled to try the case. During the taking of the testimony, the Court announced that it appeared that the issues involved were largely matters of law, particularly the defense setting up that the contract was not authorized by the Railroad Commission of the State of California and that the point required careful consideration. Thereupon the parties stipulated in writing for a waiver of a jury. The defendant duly requested the Court that it find and determine that defendant could expend its funds for only such purposes as were directed or permitted by the orders of the Railroad Commission of the State of California; that at the time alleged in the complaint defendant did not have legal authority and was not authorized in law to make the contract alleged [27] in the complaint or to employ plaintiff to render services or to agree to pay him the sums alleged in the complaint; and that under and by virtue of the orders of the said Railroad Commission controlling the disbursement and expenditure of the funds of defendants, its funds could not be legally applied in payment of the obligations mentioned in the complaint and that the Court should determine that plaintiff was not entitled to recover for said reasons. This request so made by the defendant was denied by the Court, the defendant noting its

exception, which was allowed by the Court.

The evidence bearing upon the point of said exception and the question of the legality of the contract was as follows:

[Testimony of Taggart Aston, the Plaintiff, in His Own Behalf.]

The plaintiff offered evidence in substance and effect that, prior to September 22, 1913, the defendant company planned the construction of a railroad from Red Bluff, in Tehama County, to Dixon, Solano County, California, and that plaintiff had learned of the defendant's project from Edwin E. Cox, and that Mr. Cox asked him to see if he could get one, W. J. Wilsey to undertake the selling of defendant's bonds, that this resulted in negotiations between W. J. Wilsey and the company, that Wilsey went over the line of the proposed road with the president and some of the directors of the company; that the president of defendant company, C. L. Donohoe, had, prior to September 22, 1913, stated to plaintiff that Mr. Wilsey, while so examining the project, had requested that plaintiff be employed to prepare a report of the cost and probable earnings of the proposed railroad which defendant desired to build; that Donohoe had stated that he desired plaintiff should meet with the directors of the company, for the purpose of informing [28] them as to what would be the requirements of such a report and the cost thereof, and that he, plaintiff, accordingly attended a meeting of the board of directors of the company in the Shreve Building at San Francisco, California on September 20, 1913, that he thereupon

submitted, at the request of the directors at the time of the meeting, a written proposition, that the members of the board all stated the proposition was fair and that a committee would be appointed to arrange the details of the contract, that the meeting was on a Saturday and that, on the Monday following, September 22, 1913, Mr. Donohoe sent for him, and that he met Mr. Donohoe and two other directors, Mr. E. L. Sisson and Mr. H. W. Manor at the office of the company; that Mr. Donohoe stated that the terms submitted by plaintiff were very satisfactory to the board, but that a change should be made so as to provide that the first payment should be two weeks from date instead of immediately, and that they wanted plaintiff to go ahead with the getting up of a preliminary report at once so that Mr. Wilsey, who was about to go to London, could take such report with him to London on the following week; that thereupon the follownig instrument was signed: [29]

[Letter, September 22, 1913—Aston to Donohoe.]

San Francisco, Cal., Sept. 22, 1913.

Mr. Charles L. Donohoe,

President Sac. Valley Electric R. R. Co.,

San Francisco, California.

Dear Sir:

Relative to our conversation this morning I am prepared to start on gathering data and preparing a report at once of your railroad project. Terms to be—

\$3500 for complete report and data,

750.00 to be paid a week from to-day,

750.00 in two (2) weeks from next Monday,

500.00 two (2) weeks thereafter,

500.00 two (2) weeks after that time, provided the last \$500 is not to be paid until my report is completed and \$1000.00 on your hearing from Mr. Wilsey, from London, that the matter is receiving favorable consideration.

In the event of Mr. Wilsey reporting to you that the matter is not to go through, the last \$1000.00 is not to be paid.

I am prepared to give Mr. Wilsey preliminary data and report to take with him within the next week or so.

My report will be complete, showing the estimates of cost of construction in detail and possible traffic and returns for the road, based upon actual investigation in the field and examination of traffic conditions and possibilities of returns for your railroad and comparisons with the possible earnings of this road as compared with the known earnings of other similar roads in the Sacramento Valley. A copy of my report will be delivered to your company upon completion.

Of course you will give me every facility you may have for travelling in the Valley.

Yours very truly,

(Signed) TAGGART ASTON,

Consulting Engineer.

The above approved.

(Signed) E. L. SISSON,

(Signed) H. W. MANOR,

(Signed) C. L. DONOHUE,

Directors.

Sept. 22d, Pd. \$150 on a/c and started work on report. (Signed) Taggart Aston. [30]

That E. L. Sisson was secretary and H. W. Manor vice-president of the company.

The plaintiff further testified the endorsement regarding the payment occurred, as follows:

On the morning of September 23, 1913, plaintiff called on Mr. Donohoe, the president, and stated the work of preparing the preliminary report was involving considerable expense and something should be paid on account, and that thereupon Mr. Donohoe paid him the \$150.00 and that he proceeded with the work under his contract.

The plaintiff testified that the proposition as first drafted was as follows: [31]

[Letter, September 22, 1913—Aston to Donohoe.]

San Francisco, Sept. 22, 1913.

Mr. Charles L. Donohoe,

Pres. Sacramento Valley Elec. R. R. Co.,

San Francisco, California.

Dear Sir:

Relative to our conversation this morning, I am prepared to start gathering data and preparing a report at once of your railroad project. Terms to be, \$3,500.00 for complete report and data, \$750.00 to be paid at this time, \$750.00 in two weeks time, \$1,000.00 on completion of report, and \$1,000 on your hearing from Mr. Wilsey from London, that the matter is receiving favorable consideration.

In event of Mr. Wilsey reporting to you that the matter is not to go through, the last \$1,000.00 is not to be paid.

I am prepared to give Mr. Wilsey preliminary data and report to take with him within the next week or so.

Of course, you will give me every facility you have for travelling in the Valley.

Yours very truly,

(Signed) TAGGART ASTON,

Consulting Engineer. [32]

The plaintiff further testified that about October 1, 1913, he received a letter from Mr. Donohoe, as follows:

(Here insert Plaintiff's Exhibit 3.) [33]

[Letter, October 1, 1913—Donohoe to Aston.]

San Francisco, Oct. 1, 1913.

Mr. Taggart Aston,
Foxcroft Building,
San Francisco, Cal.

Dear Sir:

Relative to the report which it has been proposed you shall make for the Sacramento Valley Electric Railroad as to the cost of construction and possibilities of revenue of the proposed railroad of said company, will say that owing to a recent order of the Railroad Commission of the State of California, it becomes necessary to notify you to refrain from the preparation of said report as there is no way provided for paying you for such report at the present time.

It is also apparent that Mr. Wilsey is not going on the proposition suggested.

Please return to this office the maps, profiles, and data furnished you in the matter.

Yours respectfully,

(Signed) CHARLES L. DONOHOE. [34]

To which the following was plaintiff's reply:

[Letter, October 2, 1912—Aston to Donohoe.]

October 2, 1912.

Chas. L. Donohoe, Esq.,

Sacramento Valley Electric R. R. Co.,

San Francisco, Cal.

My dear Sir:

I have your letter of yesterday in which you intimate that a ruling of the R. R. Commission has placed you in the embarrassing position of not being able to proceed with the financing of your road.

With regard to the contract made with me, dated September 22d, as instructed by you I went ahead at once with the preparation of the report, have made considerable progress upon it, and have already completed the preliminary report. However, I shall be glad to convenience you in any way possible that may not injuriously prejudice my position in the matter.

I am,

Very truly,

(Signed) TAGGART ASTON. [35]

Defendant offered evidence in substance and effect that at the meeting of the board of directors on September 20, 1913, it was stated on their behalf that no contract would be made with the plaintiff, unless it was approved by the Railroad Commission and that the meeting adjourned without the giving

of assent to any proposition and with the understanding that Mr. Wilsey was to come from Portland to San Francisco to meet the board and that any proposition for the sale of the company's bonds or for the employment of plaintiff was to be taken up at the next meeting of the board; that it was not stated that any committee or members of the board would act for the board in making a contract with plaintiff, but plaintiff denied that any such statements were made in his presence. The defendant further offered evidence to the effect that, at the time the document, Plaintiff's Exhibit 3, was signed, it was stated by Mr. Sisson and Mr. Manor that it expressed what they would be willing to agree to if the Railroad Commission approved such a contract, but this was denied by the plaintiff.

The plaintiff, on rebuttal, testified as follows:

“Mr. BLAKE.—Q. At the meeting of September 20th of the board of directors of the present company was there anything said or done which would make your proffer of services contingent upon getting the sanction of the Railroad Commission?

A. No. Mr. Blake, the only recollection I have of any conversation of that was that the directors endeavored to find some way of paying me that would comply with their powers; and on Monday afterwards they had apparently thought it over and they found out by paying me in these installments they would be able to do so. Of course, I was not concerned as to how they paid me or how they got the money, I simply knew that they wanted my services.”

Plaintiff further testified that he was, at the time of making of the contract, familiar with the fact that, during Mr. Wilsey's trip over the line of the proposed road, Mr. Wilsey [36] had advised Mr. Donohoe that the company would have to put up \$5,000 to cover his, Wilsey's, expenses, that Mr. Donohoe had told him that Mr. Wilsey had written him to that effect. The plaintiff further testified:

"Seeing there was no way for the company to pay those expenses I had promised in consideration of Mr. Wilsey *allow-me* something out of the commissions that he might receive if he put the matter through, I had promised out of any money that I might receive to pay those expenses of Mr. Wilsey, and he said he would pay half of them himself; he expected them to come to \$5,000; he said he would not ask the company or ask me to become responsible for more than \$2,500. I wrote and told Mr. Wilsey, or wired him, I forget which."

Telegrams passed between plaintiff and Wilsey, as follows: [37]

[Telegram, September 24, 1913—Aston to Wilsey.]

Berkeley, Cal., Sept. 24, 1913.

Wm. J. Wilsey,

504 Selling Bldg.,

Portland, Oregon.

Payments guaranteed by Donohoe and Manor as per contract. Donohoe at Willows. Returns Friday but from phone conversation had with him this evening, I feel matter can be arranged to your satisfaction on Friday morning. Shall wire you then; your attitude correct, have strengthened my hand.

ASTON. [38]

[Telegram, September 26, 1913—Aston to Wilsey.]

San Francisco, Sept, 26, 1913.

Wm. J. Wilsey,

504 Selling Bldg.,

Portland, Ore.

Donohoe unable return here until tomorrow therefore situation unchanged. I have ample guarantee money will be paid as per agreement. Wish you would not press matter on full immediate payment further until you come here Tuesday as embarrasses me seriously and am doing everything I can possibly do in your interests and to meet your requirements shall pass guarantee on to you in any way you wish upon your arrival Tuesday. You will then find Donohoe and directors willing and anxious to meet your wishes in every way possible. I shall ask Donohoe to wire you tomorrow.

TAGGART ASTON. [39]

The secretary of the company, Mr. Sisson, testified that the board of directors were at all times kept informed of the negotiations that were being carried on between Mr. Donohoe and Mr. Wilsey, and of the making of the preliminary report by Mr. Aston.

The following additional testimony was given by plaintiff:

“The COURT.—Q. But you were talking with Wilsey about the amounts required for his expenses; that had nothing to do with your contract?

A. No; nothing to do with mine; I had not guaranteed—and I told Mr. Wilsey that inasmuch as the

company said it was impossible under the Railroad Commission's ruling to pay that money, they could arrange the money in installments so they could pay it.

Mr. CLARK.—Q. Who said to you it was impossible under the Railroad Commission's orders?

A. I think Mr. Donohoe said it would be impossible to pay the large amount of \$5,000 to Mr. Wilsey; he said it would be too large an amount unless they made an application to the Railroad Commission.

The COURT.—Mr. Aston, I don't understand you. Had you made a proposition to Mr. Wilsey that you would yourself pay him the installments that you received from the company?

A. I told Mr. Wilsey that I would hold myself responsible for the payment of the \$2,500 to him."

* * * * * * * *

A. Mr. Donohoe told me he had written to Mr. Wilsey to come here on his way through; Mr. Wilsey arrived here I think on or about the 28th of September, and he was very much surprised on his arrival to find that no directors' meeting had been called as he had been asked to meet the directors, the board.

Q. This was after he had been here the first time?

A. Yes, when he was on his way through to Europe. Mr. Wilsey [40] and myself then met three of the directors, the president, the vice-president and the secretary, in consultation and he expressed himself as somewhat displeased that they had not paid me first of all the first installment as

due upon my contract so as to enable me to arrange for part of the expenses, nor had they made any proper endeavor to arrange for a further payment as he was on his way, and he considered they should have put these expenses up through me before he left, or should have enabled me to put up these expenses before he left. They expressed regret and stated that it was owing to some ruling of the Railroad Commission that had been made lately, that they had not been able to keep the terms of their contract with me, and they asked him could he not in some way arrange it so that those payments might be made later and would he not go on to London and proceed with the business. He asked them to go out of the room and try to think over some way of getting over that difficulty. They went out of the room and they came back, and Mr. Donohoe said, "Well, we can't think of any way of getting over the difficulty." "Well," Mr. Wilsey said—

Mr. CLARK.—(Intg.) Pardon me, I do not like to interrupt the thread of your narrative, but will you please state when that occurred?

A. I think about on the 28th or 29th of September; it was the day that he left for London. I think it was on the 29th, Mr. Clark; they then said, "Mr. Wilsey, can't you think of any way of helping us out of this difficulty." He then said, "Gentlemen, I will lend you the money," with the understanding, of course, that they would pay all the installments as they came due. Then they said they could not even pay those installments, they could [41] not even live up to the arrangements they made with

me. He said, "Well, it is strange you can't comply with the arrangements you made with him." He said, "You have called me down here to meet your board of directors, you know I am on my way to Europe to carry your deal through and you have fallen down in every way on all the arrangements you had previously made about me going to Europe. Now," he says, "gentlemen, I am not debarred from going to Europe." He drew a draft of \$2,500 out of his pocket, and said, "I have lots of money to go to Europe on and I am going to Europe." The last words Mr. Donohoe said, before he went away, were, "I hope you will still see your way clear, Mr. Wilsey, to take our matter up in Europe."

* * * * * * * *

"A. Well, preliminarily, after October the first and second, when Mr. Donohoe wrote me on October 1st asking me to refrain, and when I replied that I would not sacrifice my legal position in the matter in regard to the contract, Mr. Sisson, the secretary, called at my office, and I told him just previous to Mr. Wilsey leaving, and an hour or so after the meeting had with the directors of the company, Mr. Wilsey had told me that he would take the matter up in London, and Mr. Sisson was very pleased indeed to hear of it. That was one or two days after Mr. Wilsey left. I said, "Now, I want certain other documents from the company"; I asked him to give me all the documents and maps that they had not previously given me, and he went up and brought me down—I think I may have gone up to

get them—however, I received all the documents that were necessary for the completion of my data. I handed Mr. Sisson my draft report, he brought it up and the company had the report typed, and four or five copies were made of it. [42]

Q. Now, you are speaking of what time, and with respect to what report?

A. With respect to the preliminary report. That was after I received the letter from Mr. Donohoe asking me to refrain.

Q. That was on what date?

A. That was on or about the 3d or 4th of October.”

* * * * *

“A. When Mr. Wilsey left he was very angry with Mr. Donohoe, and he said, “Mr. Aston, for a day or two don’t tell Mr. Donohoe, I will take this up.” Before he left, I said, “Mr. Wilsey, I sincerely hope you will see your way to take this up.” Mr. Wilsey told me—he said, “Just let Mr. Donohoe stew for a day or two, don’t tell him I am going to take it up, but you can tell Sisson and the other, you can tell Sisson and the other directors; Donohoe has not been fair with me, bringing me down here and not having the directors’ meeting.”

The following letters passed between Mr. Donohoe and Mr. Aston, Mr. Aston and Mr. Sisson, and Mr. Donohoe and Mr. Cox: [43]

[Letter, November 11, 1913—Aston to Donohoe.]

S F., Nov. 11, 1913.

Mr. C. L. Donohoe,
Shreve Bldg.,
San Francisco.

Dear Sir:

Referring to your cablegram to Mr. W. J. Wilsey of the 8th inst., in which I understand you expressed regret that uncontrollable circumstances had previously deterred you from acceding to what you described as his reasonable request for out of pocket expenses, and in which you asked him what inducement you could now offer to have him remain in London to push your railway and land deal,—I feel that Mr Wilsey must already have obtained encouragement in the tentative efforts which he advised me he would make by using my report prepared upon your instructions, as he has replied to me to the effect (his cable does not *decode* very clearly) that he has no further business on hand, but will remain in London to carry out your deal if you will furnish amount for expenses.

This cable I have shown you to-day. No as you have already expressed yourself that Mr. Wilsey's request was a reasonable one, and as you asked him in your cablegram to name his terms to remain over in London to further arrangements for underwriting, I cannot, therefore, now understand your inconsistency in refusing to consider paying said expenses, or even to cable him a reply. And as it would not be fair to ask him to waste further time,

as you seem to have been fooling him right along, I am therefore cabling him that expenses will not be allowed to enable him to remain in Europe in your interests. Owing to indifferent business conditions now prevailing in Europe, Mr. Wilsey would probably have to remain there until the end of January, 1914, in order with any hope of success, to devote himself exclusively to your business.

I am,

Very truly yours,

(Signed) TAGGART ASTON. [44]

[Letter, November 14, 1913—Aston to Donohoe.]

San Fransisco, Nov. 14, 1913.

Mr. C. L. Donohoe,

Pres. Sacramento Valley Elec. Ry. Co.,

San Francisco.

Dear Sir:

I herewith enclose you copy of a letter of even date, which I have mailed to E. L. Sisson.

I also be g to advise that, in Mr. W. J. Wilsey's letters to me of Oct. 30th and Nov. 1st, received to-day, he states he had just received my report and S. V. E. R. R. plans and documents and was going to give the matter attention as soon as he had completed other business then in hand. In both letters he stated his belief that he could finance your 50,000 acres of land at once, but that the Railway financing would be slower as his underwriters were not taking new business until they had disposed of balance of last 8 months issues.

In a cable dispatch since, however, Railroad financing would appear to have taken a more favor-

able turn, as he had parties in Brussels and Antwerp and proposed going there early next week—if expenses were provided—otherwise he intended coming home.

Of course, before carrying negotiations very far he would require final reports and other documents, and the expense of remaining in Europe in your interests would therefore be very great for the necessary length of time to be devoted to you and your company's interests.

Very truly yours,

(Signed) TAGGART ASTON. [45]

[Letter, November 19, 1913—Sisson to Aston.]

Red Bluff, California, Nov. 19, 1913.

Mr. Taggart Aston,

526 Foxcroft Bldg.,

San Francisco, Cal.

Dear Sir:

Your letter in reference to your interview with Mr. Donohoe received. Mr. Donohoe is certainly acquainted enough with the conditions to know what to do. Under the last order of the Railroad Commission it is impossible to spend any money for engineer reports or expenses such as you suggest.

If Mr. Wilsey can do nothing unless his expenses are advanced, then I am of the opinion nothing can be done. When in the City I will try and see you.

Very truly yours,

(Signed) E. L. SISSON. [46]

[Letter, November 14, 1913—Aston to Sisson.]

San Francisco, November 14, 1913.

Mr. E. L. Sisson,

Secy. Sacramento Valley Elec. Ry. Co.,

Red Bluff, California.

Dear Mr. Sisson:

Mr. Donohoe cabled Mr. Wilsey last Saturday to the effect that he regretted uncontrollable circumstances had previously prevented him from acceding to his reasonable terms, that he felt he (Wilsey) could do the business, and asked his terms to remain in Europe to complete it. Mr. Wilsey replied to me to the effect that his other business was finished, but that he would remain to complete your deal if necessary expense money was cabled. He has got parties in Brussels and Antwerp and was prepared to go there next Tuesday.

Mr. Donohoe has since said that he regretted sending his cable and now states he will not pay one cent toward Mr. Wilsey's expenses of remaining over. Such action is difficult to understand, as it would only have been necessary for him to immediately conform to his contract with me in order to have enabled me to supply these expenses and have the matter go forward. His refusal to do so is nullifying all my *effects*, and is causing me serious damage.

As you are aware Mr. Wilsey was even to loan the money for expenses, if guaranteed. And Mr. Donohoe refused to guarantee me the money he had contracted to pay me even after he had promised to guarantee it. It is impossible to do business in the

face of such inconsistency and broken promises on Mr. Donohoe's part.

The delay will fall through unless you and the other directors take the matter up. I should be glad to see you and Mr. Huston at the earliest possible moment you can come here.

Yours very truly,

(Signed) TAGGART ASTON. [47]

[Letter, December 24, 1913—Donohoe to Aston.]

Willows, California, Dec. 24, 1913.

Mr. Taggart Aston,

Foxcroft Building,

San Francisco, Calif.

Dear Sir:

I am in receipt of your letter relative to the estimate on cost of construction and probable traffic returns in the Sacramento Valley Electric Railroad. I went all over this matter with Mr. Wilsey and he stated to me that any expert who knew anything about electric roads would be convinced beyond question that the road would pay from the start by making trip over the proposed line, and I am convinced that any engineer who comes out here who is not familiar with the result of electric interurban roads, will not be a proper person to make an unbiased report, and if he is familiar with the result of these roads, he will know as soon as he goes over the territory that this will be a paying road.

I have had Mr. Pohl of Bogart & Pohl, one of the most proficient engineers in New York City, over the line, and he made a report that the road would pay from the start, even on Mr. Dozier's cost of con-

struction, and he figured it all out. You have a copy of his figures included in his report. Any one knows the general rule is the first year no interurban road, as a matter of fact, pays much profit, but it takes a year or so to build up the business and get it on a paying basis.

Even with the figures you have there, the road will pay from the day it starts, that is—it will pay all fixed charges. The 6% on the preferred stock is not an obligation unless it is earned by the road, and no bond issue would provide for a sinking fund for at least five years. It is always provided in these matters that a corporation shall have a leeway of a few years [48] before applying its earnings to the sinking fund, otherwise no public utility such as this could be started or financed. Even with the figures contained in your letter it has a remarkably good show.

Burnett in his estimate, has been extremely conservative.

Mr. Pohl, of Bogart & Pohl, have been several weeks in the Valley estimating matters carefully and his report shows even on his estimate of cost, the road will earn a surplus the first year of about \$90,000.

If any expert engineer is sent out here and will go over the line, and report it will not pay, then we can not hope to do anything with anybody he represents, because he does not know his business. If you were to work on this for the next five years, you could not gather any more data that we already have.

We have the data prepared by Mr. *Dozer* concern-

ing the traffic and possible revenue, a letter compiled by Mr. Janes and a letter prepared by Mr. Burnett as to the traffic and possible revenue, also data prepared by Mr. Pohl as to the traffic and possible revenue, and I cannot see as we can get anything else. If you cannot take these reports and by going through them make out a report that is satisfactory it is probably hopeless for us to try to do anything with the people yourself and Mr. Wilsey represents.

If you have not all these reports and want them, go over to the office at 1006 Shreve Building and ask Miss Ketheryn to call me up and I will authorize the delivery of them to you.

Yours truly,

(Signed) C. L. DONOHOE. [49]

[Letter, December 24, 1913—Donohoe to Cox.]

Sacramento Valley Realty Co., Inc.,

Willows, Cal., December 24, 1913.

Mr. Edwin E. Cox,

1002 First Nat. Bank Bldg.,

San Francisco, California.

Dear Sir:

I herewith enclose you a copy of letter I have written to Mr. Aston. We have all the data that we can get on the subject. In addition to that, Mr. Aston can go over to the Railroad Commission and get the gross earnings per mile for the last two years of the Northern Electric, Sacramento and Woodland Central California Traction, and other electric roads, and then he can make a comparison of the territory covered by these roads and the territory covered by

ours, and take the earnings per mile and apply it to 160 miles of road and he will immediately see that our road will earn a very large amount of money in the first year over and above all fixed charges and sinking fund.

There is nothing more Aston could do if he tried. Of course, if he comes to the conclusion that the road will not pay there is no use of dealing with Wilsey on those bonds; however as stated in my letter to Aston, Wilsey is absolutely certain himself that the road will pay and any engineer expert that knows anything about the interurban roads will state immediately upon looking over the territory that the road will pay.

It is a very difficult thing to gather data in matters of this kind and the best evidence is the comparison of our territory with the territory of other roads that are paying.

I do not know of any way to help this matter out as Aston might travel over the country here for twenty years and he would not gather any more data than that mentioned in my letter to him.

Yours very truly,

C. L. DONOHUE, [50]

The plaintiff further testified concerning his efforts to bring Mr. Wilsey and the company together on a contract to market its bonds in England or upon the Continent of Europe, as follows:

“Mr. CLARK.—Q. As I understand you on direct examination, you testified that before you had signed this proposition or these propositions addressed to Mr. Donohoe as president of the company,

Mr. Donohoe had said to you that the Railroad Commission would not allow payments to Mr. Wilsey?

A. Mr. Donohoe said that he did not know whether they would or not. How could Mr. Donohoe say that if he had not been before the Railroad Commission. He could not possibly say they would not allow it if he had not asked their approval. The reason for Mr. Donohoe and Mr. Wilsey not going before the Railroad Commission was so that it would not be made public that Mr. Wilsey was endeavoring to underwrite this because the Southern Pacific would immediately know who Mr. Wilsey's principals were. That was the reason Mr. Wilsey did not want to go before the Railroad Commission."

The following further evidence was then given with regard to the negotiations for a contract between the company and Mr. Wilsey for the sale of the company's bonds abroad:

"Mr. CLARK.—Q. Did Mr. Wilsey talk with you before you addressed these written propositions to the company, did he talk with you separate and apart from Mr. Donohoe about the fact that the Railroad Commission should not be approached with this proposition or this bargaining?

A. Yes, sir. When Mr. Wilsey was down in August he said he would not like his name to appear in this matter because it would nullify all his efforts in London. He said the Southern Pacific would know at once who his [51] principals were and they would take steps through secret channels to nullify his efforts in financing the company.

Q. Did you and Mr. Wilsey discuss the fact that

It would be prejudicial to you if this matter of bargaining with the company was submitted to the Railroad Commission?

A. Do you mean to me personally.

Q. To your vendor?

A. To the vendor, yes.

Mr. BLAKE.—To his vendor or to Mr. Wilsey's vendor?

A. To the company's vendor; it would nullify our efforts. We understood that thoroughly.

Mr. CLARK.—Q. How long before you submitted this proposition to the company, these written propositions to the company of September 22, 1913, was it that you had talked with Mr. Wilsey in regard to this?

A. Mr. Wilsey was down a few weeks before that; he arrived in San Francisco from Red Bluff with Mr. Donohoe. He had been over the line with Mr. Donohoe and the other directors. He arrived in San Francisco and I saw him when he arrived in San Francisco.

Q. Did you talk over with Mr. Wilsey the communications between Mr. Donohoe and Mr. Wilsey so as to keep conversant with their negotiations?

A. Naturally I would talk over any communications that had passed prior to that time.

* * * * *

Q. How long prior to September 22, 1913, was it that you first talked with Mr. Wilsey about the impropriety of presenting to the Railroad Commission the terms of employment of Mr. Wilsey for the purpose of selling the bonds or stock of the company?

(Testimony of Taggart Aston.)

A. There was no question about presenting to the Railroad Commission the terms of employment of Mr. Wilsey. [52]

Q. What I mean is this; how long prior to September 22, 1913, was it that you first talked with Mr. Wilsey about that being a bad plan, the matter of presenting this thing to the Railroad Commission?

A. At the time of Mr. Wilsey's visit to San Francisco, after he came down from Red Bluff; I cannot give you the date of that; I cannot tell whether it was the end of July or the beginning of August or the beginning of September. I think it was about the end of August or the beginning of September."

* * * * * * * *

Q. Did you understand, before Mr. Wilsey went to Europe, that before this company would make any final contract with Mr. Wilsey for the disposition of its stock and bonds, it would be compelled to submit the proposition to the Railroad Commission?

A. It was understood that before any deal with any underwriters could be completed the terms of such underwriting would have to be submitted to the Railroad Commission.

Q. You understood that to apply to both the sale of stock and bonds of this company?

A. I understood that, yes, sir."

It was admitted defendant was incorporated as a common carrier and was within such jurisdiction as the Railroad Commission of the State of California has over a state railroad corporation.

The following correspondence between W. J. Wil-

(Testimony of Taggart Aston.)

sey and Mr. Donohoe, president of the company, with respect to the contemplated contract between the company and Mr. Wilsey for the sale of said bonds, was received in evidence: [53]

[Letter, September 15, 1913—Donohoe to Wilsey.]

San Francisco, Sept. 15, 1913.

Mr. W. J. Wilsey,
Palace Hotel,
San Francisco, Calif.

Dear Sir:

Your communication, relative to financing of the railroad, received and seems satisfactory except as to the advancing you expenses of your trip to Europe, not to exceed \$5,000.

The order I have from the Railroad Commission, under date of Aug. 13th, 1912, permitting us to proceed, provides:

That we can not incur an indebtedness or make a contract for more than \$1,000.00 without obtaining the approval of the Commission.

In order to comply with your demand in this respect we would have to go to the Commissioner and necessarily have a hearing on the matter, and it would have to be disclosed to whom the money was going and the purpose of the same, and that would become a public record and might possibly be disastrous to our plans. In addition we would have to make a showing as to the probabilities and possibilities of your success in the matter.

I had hoped that the commission of $2\frac{1}{2}\%$ would be sufficiently large to justify you financing your

own trip, and, necessarily, you must know now the possibilities of your success and from our conversation it would seem that you are not taking much chance in the matter.

I would like to hear from you on the subject.

(Signed) Yours very truly,
CHARLES L. DONOHUE. [54]

[Letter, September 15, 1913—Donohoe to Wilsey.]

San Francisco, Sept. 16, 1913.

Mr. W. J. Wilsey,
Selling Bldg.,
Portland, Oregon.

My dear Mr. Wilsey:

After considering your proposition which involves the bearing of your expenses on a trip to Europe, in connection with the business we have been discussing, during the last week; if it were a clear brokerage matter involved your contention for these expenses would be perfectly right, but, as I view the situation, it has an entirely different aspect.

In our recent past week's association, I am frank to say that, in my business career, I have never met anyone else for whom I have felt so friendly in so short an acquaintance and, in addition to that, my investigations of you have developed a feeling of trust in any transactions I might have with you so that I would feel justified in entering into any business arrangements, so far as you are concerned, on practically an oral understand—if necessary.

In our recent trip down the valley, I endeavored to be perfectly frank with you and showed you the inside of the important things I have been working

on for the past three years, hoping of course that by doing so I would enlist your interest,—not in the nature of a brokerage business,—but in closer relationship of practically a partner.

It seems to me that in the scheme, as I outlined it to you and which you approved, there should be a great deal of money in it for you and I and any others connected with us. From my viewpoint, if this money is procured, the profits cannot [55] fail, and I think you feel the same way.

I have expended three years of my time, and a great deal of money, in getting this scheme up to its present, and, as you expressed it—“perfect condition”—and am willing that you should enter into the matter on an equal basis with myself in consideration of you procuring the necessary capital which I am confident you can do; and I feel also that it is nothing but fair that you should assume, in connection with it, at least some of the risk.

You are going to Europe anyway. In fact, I understood you to say that your arrangements have been made to leave here about the 25th for New York, and the taking over of our proposition would not cost you any additional expense.

I have disclosed to you everything with this scheme and I do not regret doing it, and I did so to show you that I had absolute trust and confidence in your ability to get the needed financiers to put the deal over with profit.

I am willing of course to enter into any arrangement that may be necessary to secure you in your interest in the result of the enterprise, and I hope

you will see your way clear to take the matters up for our joint benefit without the advancement of any expenses.

You realize as stated in my letter of last evening, that it would be disastrous to our whole scheme for me to go to the Commission for an order authorizing this expense, and there is no way to charge this item of expense without disclosing the real nature of it, and it would be a hazardous thing to do in any event. That of course you will readily understand. It would involve a public hearing which, under all conditions, must be avoided. [56]

I will appreciate a frank and friendly letter from you on the subject at an early date.

Of course, I would be willing to guarantee to you the paying back of your expenses for your trip, not to exceed \$5,000.00, in the event that your mission in our behalf there should fail through any cause which originates with us.

Yours very truly,
(Signed) CHARLES L. DONOHOE,
President. [57]

[Letter, September 18, 3—W. J. W. to Donohoe.]
Sept. 18, —3.

Mr. C. L. Donohoe,
Shreve Building,
San Francisco, Calif.

Dear Mr. Donohoe:

I received your note from Mr. Cox late in the evening and did not take time to answer same before leaving for home, but notified Mr. Cox what I thought of the whole matter. No doubt he has

informed you so I will not go into the details mentioned in your letter.

I quite understand the difficulty with the Railroad Commission in California, but you people who are largely interested should not hesitate to gamble on such a splendid enterprise.

With my best wishes to you and your project, I am

Yours very truly,

(Signed) W. J. W. [58]

[Letter, September 18, 3—Wilsey to Donohoe.]

Sep. 18, —3.

Mr. C. L. Donohoe,

Shreve Building,

San Francisco, Calif.

My dear Mr. Donohoe:

I have your kind letter of Sept. 16th, and note carefully the contents. Taking up your arguments each in turn permit me to say:

That if you went to any reliable brokerage house in the United States, England or France and asked them to finance this matter, they would ask you for a deposit five times as large as I have asked for expenses. I have had this experience, and they would not then give you as strong connections as I have at the present time, and no brokerage house connected.

I have all confidence in you and your associates whom I have met and will say that your word to me is as good as your bond. If I did not feel this way I would have ended the matter at the end of our journey, but you more than convinced me in all matters pertaining to both yourself and your enterprise.

I appreciate the statement of your taking me in

with you as practically a partner, and assure you that if I undertook the financing of this project I should take the same interest pertaining to the same as you and your associates would, as I feel, like yourself, that if we can finance the project along lines laid down, there should be large profits for all concerned.

You say that you have expended three years and a great deal of money in getting your project in [59] "perfect condition" and you think I should assume some of the risk. Dear Mr. Donohoe, I have spent seven long years and thousands of dollars securing the connections I now have, and I am willing to put my services and those connections at your command, asking you only to meet the expenses necessary, and it seems to me if those connections and my time are not worth putting this small amount of money against, that you cannot have much faith in my ability to do business. In other words, you ask me to give you those connections, give you my time, and use my own money for expenses to finance your deal, and, if possible, hand it *hand it* back to you finished, and you take no risk however. The time alone that I will have to put into this deal is worth more to me than three times the expense money, yes, five times the expense money, and I would not undertake the deal if I did not honestly believe I could finish it.

I told you on several occasions on the trip that if I went to Europe I would want to leave here by the 25th of September, so that I might be able to take advantage of the best time of the year to do business

there, namely, between October 15th and the holidays.

I have nothing to take me there now as I am just closing up a large real estate matter on Coos Bay, which I believe I showed you. This deal will keep a man busy, as the matter involves eleven millions all told, and it can't be put over in a week.

You are quite right in not going before the Railway Commission. That must not be done in any event, but it seems to me that a small amount subscribed by each of you gentlemen interested would mean but little to you, to assist in putting [60] the deal through, as no matter where you do this business, when it comes to be done you will have to meet this same question, and in a much larger degree, as any broker will have to work up his syndicate. I do no business with brokers, and my syndicates are already established beyond question.

You say that you will be willing to guarantee the payment back to me of the amount named should I not be able to put the deal through. This puts the shoe on the other foot; in other words, it means that I loan this money; if I fail it is paid back. Now, I leave it to you, don't you think it only fair that you should gamble this expense money against my time and connections? If you were not satisfied with me, you would not make the above proposition to pay back. If I were not satisfied with you and your project, I would not gamble my time and connections against your money.

Now, I have tried to be frank and friendly with you and I appreciate that you have been so with me,

and I assume you that any and all the information you have given me well be held in strict confidence should we not be able to arrive at any agreement, and I give you my best wishes for your successful placing of this splendid deal, but I cannot close up my business affairs here for some months, and just at this time, and devote all my time, energy and money on this deal, and take all the chances, while you and your associates take no chances. If we gamble on this deal, let us at least even up the hands, as you are a man of the world and know that all such things as this are a gamble.

You should receive this letter on Saturday A. M., in time for your meeting, and I shall have to know at once so that I can spend the following week closing up matters. Would you do me the favor of writing me your final conclusion?

With esteem and friendship, I am,

Yours truly,

(Signed) WILSEY. [61]

[Telegram, September 22, 1913—Donohoe to Wilsey.]

TELEGRAM. .

San Francisco, Sept. 22, 1913.

W. J. Wilsey,

504 Selling Building,

Portland, Oregon.

Your proposition acceptable Directors desire personal conference prior to execution of formal agreement have made satisfactory arrangements with Aston who has commenced on report. When can you be here on way to England.

(Signed) C. L. DONOHOE. [62]

[Telegram, September 22, 1913—Wilsey to Donohoe.]
NIGHT LETTERGRAM.

Sept. 22, 1913.

C. L. Donohoe,
Shreve Building,
San Francisco, Calif.

Telegram received. I plan to sail from New York on October fourth. My business affairs here must be arranged before leaving, so it is just possible will not have time to go via Frisco. Better send all documents here. If I have time will meet you on the twenty-ninth.

WILSEY. [63]

[Telegram, September 23, 1913—Donohoe to Wilsey.]
TELEGRAM.

San Francisco, September 23, 1913.

W. J. Wilsey,
Selling Building,
Portland, Ore.

What document do you require. Can have them ready here on your arrival twenty-ninth. It is essential that my directors have conference with you. Will arrange to have directors' meeting 29th. Answer.

C. L. DONOHOE. [64]

[Telegram, September 23, 1913—Wilsey to Donohoe.]
LETTERGRAM.

Sept. 23, 1913.

Mr. C. L. Donohoe,
Shreve Building,
San Francisco, Calif.

In order to settle my business affairs here and meet *you* board will arrange sail on October seventh. Arrive Frisco Tuesday morning. Must leave there Wednesday morning direct New York. Aston can tell you what documents needed. You make real estate statement number acres, place, price and prepare maps of same.

WILSEY. [65]

The plaintiff testified that, for introducing Mr. Wilsey to the company, he understood he was to receive a share of the profits which Mr. Wilsey might receive, although there was no definite agreement as to the matter; that he met Mr. Wilsey at times at his hotel in San Francisco and was familiar with the position taken by the company in its letters to Mr. Wilsey.

[Testimony of A. C. Huston, Counsel for Defendant.]

A. C. Huston, counsel for defendant, testified, in substance: That he as one of the directors of the defendant, in September, 1913; that the board consisted of seven members; that, as attorney for the company, he had prepared the Articles of Incorporation, dated April 26, 1912; that on May 31, 1912, he prepared the company's application to the Railroad Commission of the State of California for

leave to issue and sell its stock and that upon this application the Railroad Commission made its order. This order was offered in evidence and is as follows:
[66]

[Order of Railroad Commission, August 13, 1912.]

**BEFORE THE RAILROAD COMMISSION OF
THE STATE OF CALIFORNIA.**

Application No. 75.

In the Matter of the Application of SACRAMENTO VALLEY ELECTRIC RAILROAD COMPANY for an Order Authorizing the Issuance of 30,000 Shares Preferred Stock Par Value \$3,000,000 and 7500 Shares Common Stock Par Value \$750,000.

APPEARANCES.

A. C. HUSTON, Representing Applicant.

OPINION.

GORDON and EDGERTON, Commissioners.

This is an application by the Sacramento Valley Electric Railroad Company for an order authorizing the issuance by applicant of 30,000 shares par value of \$3,000,000 preferred stock and 7,500 shares par value \$750,000 common stock, and authorizing applicant to sell said preferred stock at par and to pay commissions on the sale thereof of 20 per cent and authorizing the sale or exchange of said common stock for rights of way.

The articles of incorporation of applicant were filed on the 4th day of May, 1912, and thereunder applicant is empowered to build and operate a standard-gauge electric, steam or other motive-power

passenger and freight railroad through the following territory.

Commencing in the town of Red Bluff, State of California, and running thence in a general southerly direction through the counties of Tehama, Glenn, Colusa and Yolo to the City of Woodland, County of Yolo, State of California, a distance of 113 miles; thence in a general southeasterly direction through or near the town of Davisville in Yolo County, State of California, and the town of Dixon, County of Solano, State of California, to the most convenient [67] and practicable point of connection with the Oakland, Antioch and Eastern Railway in the County of Solano, State of California, a distance of 36 miles, an intermediate branch beginning in the Town of Colusa, State of California, and running thence in a general westerly direction through or near the Town of Williams in the said County of Colusa, connecting with the main line from the town of Red Bluff to the City of Woodland, a distance of 11 miles. The estimated length of said railroad, including all of its intermediate branches is 160 miles. The authorized capital stock of applicant is \$5,000,000, divided into 30,000 shares of preferred stock of the par value of \$100 per share, and 20,000 shares of common stock of the par value of \$100 per share. The holders of the preferred stock are entitled to receive when and as declared from the surplus profits arising from the business of the corporation yearly dividends at the rate of 6 per cent per annum, payable in monthly, quarterly or semi-annually install-

ments as the by-laws shall from time to time provide. Prior to July 1, 1915, the dividends on the preferred stock shall not be cumulative but until that date no dividends shall be paid or set apart upon the common stock in any year until a dividend at the rate of 6 per cent per annum in each year shall have been set apart upon the preferred stock. Commencing with the 1st day of July, 1915, the dividends on the preferred stock shall be cumulative and shall be declared and paid or set apart before any dividends on the common stock shall be paid or set apart so that if at any time dividends amounting to 6 per cent per annum shall not have been paid thereon or declared and set apart for all preceding dividend periods, the deficiency shall be declared and paid or set apart before any dividends shall be paid or set apart for the common stock. Whenever the cumulative dividends on the preferred [68] stock for all previous years shall have been declared and the accrued installments for the current year shall have been declared and shall have been paid or set apart and the corporation shall have paid such cumulative dividends for the previous years and such accrued installments, or shall have set aside from the surplus profits arising from its business a sufficient sum for the payment thereon, the board of directors may declare dividends on the common stock payable then or thereafter out of any remaining surplus profits to the amount of 4 per cent per annum. If after the declaration of 6 per cent dividends on the preferred stock and 4 per cent dividends on the common stock there remains any

surplus funds available for dividends, said surplus shall be equally divided between the holders of the preferred and common stock. In the event of any liquidation or dissolution or winding-up of the corporation, whether voluntary or involuntary, the holders of the preferred stock shall be entitled to be paid in full both par value of their issues and the unpaid cumulative dividends thereon, before any amount shall be paid to the holders of the common stock and after payments to the holders of the preferred stock of its par value and on unpaid accruing cumulative dividends thereon, the remaining assets and funds shall be divided and paid to the holders of the common stock according to their respective shares.

The board of directors have authority from time to time to set aside from the surplus profits arising from the business of said corporation such a sum as the board of directors may determine for working capital to be employed in the business of said corporation.

Sixteen hundred shares of the common stock, par value \$160,000 have been subscribed for and \$16,000 thereof has been paid in cash to the corporation.
[69]

It is proposed by the incorporators of this company to build and operate an electric railroad through the territory named above. Three distinct routes have been surveyed as shown by the maps on file herein and applicant has not yet determined which of these three routes will be finally selected.

Applicant has had prepared and filed with the

Commission estimates, by engineers, of the cost of building this railroad with its branches along the three routes surveyed as aforesaid. These estimates show a cost, exclusive of rights of way, of \$4,708,200 for the so-called West Line; \$4,826,400 for the Middle Line; and \$5,106,200 for the East Line.

According to the testimony of Mr. Donohoe, president of the corporation, it is expected to realize approximately \$1,500,000 on the sale of preferred stock and later float a bond issue for \$3,500,000 additional to complete the building of the road.

Applicant requests that it be allowed to sell the preferred stock on installments of \$25 cash and balance in equal installments in 3, 6 and 9 months, promissory notes to be given for the deferred payments. It is also requested that the entire 20 per cent, or \$20 on each share, be paid the salesman on receipt of the first cash payment of \$25.

The plan to raise a substantial part of the money necessary for the construction of this road through the sale of stock is commendable as the stock does not fasten upon the corporation fixed charges, a failure to meet which inevitably places the corporation in dire straits. It is to be regretted that many utility corporations in this state have seen fit to raise the entire amount of money invested in their enterprises through the sale of bonds, thus burdening the entire physical value of their properties with fixed charges and compelling those in control of the utility to [70] produce enough money regularly to meet these charges. This often results in the failure to

properly take care of depreciation and to keep the plant in first-class efficient condition, because of the necessity of squeezing the business to produce these inexorable fixed charges.

The proposal to pay 20 per cent commissions on the sale of stock, in our opinion, is not unwarranted, particularly in view of the fact that bonds are being sold on established utility corporations at this amount of discount. Of course, no commission should be paid on stock already subscribed for or sold without the services of a salesman. As to the time of his payment, however, we disagree with applicant in that we feel that his entire commission should not be taken from the first cash payment. First, because this only leaves \$5.00 out of this payment in the hands of the company, and, second, we feel that the salesman should share with the company the risk of a failure by the purchaser to make any more payments. Hence, we conclude that the commissions shall be paid in proportion as the purchase price is paid in, that is to say,—the salesman shall receive 20 per cent of each cash payment. The form of contract for the sale of stock should be submitted for the approval of the Commission.

In order that reasonable assurance be had that the actual construction of this road will not be entered upon before there is sufficient money in hand to warrant proceeding with the scheme, there should be \$750,000 paid in on stock before any construction work begins or any expense other than that incident to the sale of stock is incurred by the company, and

title to rights of way should be taken conditioned on the receipt by the company of the above amount of money.

In order that the Commission may assure itself at all [71] times that the money received from the sale of this stock is being properly and judicially expended for the purposes named, we recommend that in addition to a compliance with Order No. 24, applicant be ordered to submit to the Commission for its approval before the execution thereof, all general contracts exceeding the amount \$1000.

Subject to the foregoing conditions we recommend that the application be granted.

The following form of order is herewith submitted:

ORDER.

Application having been made to the Railroad Commission of the State of California by Sacramento Valley Electric Railroad Company for an order authorizing the issue by said company of 30,000 shares par value \$3,000,000 preferred stock and 7,500 shares par value \$750,000 common stock, and authorizing applicant to sell said preferred stock at par and to pay commissions on the sale thereof of 20 per cent and authorizing the sale or exchange of said common stock for rights of way.

And a hearing having been duly held and it appearing to the Commission that the money and property to be secured by the issue of said stock are necessary and reasonably required by said company for the purpose of procuring rights of way and constructing thereon the railroad as specified in said

application and exhibits attached thereto, and the purposes for which the proceeds of the issue of said stock are to be used are not in whole or in part reasonably chargeable to operating expenses or income.

IT IS HEREBY ORDERED that the Railroad Commission of the State of California does hereby authorize the issue by Sacramento Valley Electric Railroad Company of \$3,000,000 par value preferred stock and \$750,000 par value common stock. [72]

Said preferred stock to be sold to net not less than 80 per cent of its par value to the company, provided that said stock may be sold to be paid for in installments, said installments to be not less than \$25 cash at the time of sale and the balance in equal installments in not more than 3, 6 and 9 months thereafter. Promissory notes bearing interest at 6 per cent per annum may be taken for the deferred payments, the stock not to be delivered until fully paid for. Provided further, that if commissions be paid on the sale of said stock they shall not exceed an amount which will yield the aforesaid 80 per cent par value of said stock net to the company and said commissions shall be paid in proportion as the cash for said stock is received by the company. No commission shall be allowed or paid on the stock already subscribed for nor shall any commission be allowed or paid except for services actually rendered in the sale of stock.

Said common stock may be sold by the company under the conditions above set out for the sale of preferred stock or said common stock may be ex-

changed for rights of way over which said railroad is to be constructed and operated, such exchange to be made upon the basis of the fair market value of such rights of way and the par value of the common stock.

Provided that the exchange of common stock for rights of way shall not be finally consummated until \$750,000 on the sale of preferred stock shall have been paid in to the treasury of the company. Proper provision, however, may be made for the conditional acquiring of said rights of way in exchange for said common stock pending final consummation of such exchange. Construction of the road shall not be entered upon nor liability created, nor money paid out except for commissions as aforesaid until there shall be in the hands of the company from the sale of stock \$750,000. [73]

The proceeds from the sale of said preferred stock shall be used for the following purposes:

For the purchase of materials and rolling stock and the construction of an electric railroad in certain territory all as set out in detail in the application and exhibits attached thereto and filed therewith.

Said company shall keep separate, true and accurate accounts showing the receipt and application in detail of the proceeds of the sale or exchange of said stock hereby authorized to be issued and on or before the 25th day of each month the company shall make a verified report to the Commission in accordance with the Commission's General Order No. 24, stating the sale or disposal of such stocks during preceding month, the terms and conditions of such

sale or other disposition, the moneys or property realized therefrom and the use and application of such money or property. And in addition thereto said company shall submit to this Commission for its approval the form of all contracts for the sale or exchange of stock and before the execution thereof all contracts for grading, bridging, track, including materials and labor, equipments of all kinds and all materials, labor and property involving costs in excess of \$1000.

The authority hereby given to issue such stock shall apply only to stock issued by said company on or before the 1st day of August, 1913.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 13th day of August, 1912.

JOHN M. ESHLEMAN,
H. D. LOVELAND,
ALEX GORDON,
E. O. EDGERTON,

Commissioners.

[Seal]

H. C. MATHEWSON,
Assistant Secretary, [74]

That following this order and previous to the negotiations with Mr. Aston another application had been made to the Commission, that this application was pending at the time of the negotiations with Mr. Aston and that upon this application the commission made its order, on September 27, 1913. This order was offered in evidence and is, as follows: [75]

[Order of Railroad Commission, September 27, 1913.]

Decision No. 971.

**BEFORE THE RAILROAD COMMISSION OF
THE STATE OF CALIFORNIA.**

Application No. 75.

In the Matter of the Application of SACRAMENTO VALLEY ELECTRIC RAILROAD COMPANY for an Order Modifying the Order of the Commission of Date August 13, 1912, Wherein the Said Company was Granted Permission to Sell and Issue 30,000 Shares of Preferred Stock and 7500 Shares of Common Stock.

EDGERTON, Commissioner.

SUPPLEMENTAL OPINION.

This is an application for a modification of the order made herein on the 13th day of August, 1912.

That order authorized the issuance and sale of preferred and common stock under conditions therein specified. Among said conditions, was the following:

“Said preferred stock to be sold to net not less than 80 per cent of its par value to the company, provided that said stock may be sold to be paid for in installments, said installments to be not less than \$25 cash at the time of sale and the balance in equal installments in not more than 3, 6, and 9 months thereafter. Promissory notes bearing interest at six per cent per annum may be taken for the deferred payments, the stock not to be delivered until fully paid

for. Provided further, that if commissions be paid on the sale of said stock they shall not exceed an amount which will yield the aforesaid 80 per cent par value of said stock not to the company and said commissions shall be paid in proportion as the cash for said stock is received by the company. No commission shall be allowed or paid on the stock already subscribed for nor shall any commission be allowed or paid except for services actually rendered in the sale of stock."

Said order also provided:

" Construction of the road shall not be entered upon nor liability created, nor money paid out except for commissions as aforesaid until there shall be in the hands of the company from the sale of stock \$750,000." [76]

Said order also provided:

"The authority hereby given to issue such stock shall apply only to stock issued by said company on or before the 1st day of August, 1913."

We are now asked to modify said order so as to permit the payment of general expenses incurred by said company other than commissions paid on the stock, notwithstanding it has not in its hands \$750,000 from the sale of stock, and to permit the taking of promissory notes for the entire price of the stock sold, and to extend the life of said order from August 1, 1913 to August 1, 1914.

It appears that up to August 31, 1913, this company has received \$416,401.55 on account of the sale

of its preferred stock, \$212,290.00 of which is cash and \$204,111.55 is represented by promissory notes, and that it has paid out in commissions on the sale of said capital stock, the sum of \$80,290.29, and for expenses in conducting the business of said corporation, the sum of \$40,468.42.

It was testified to at the hearing that through the activities of the officers and agents of the company 90 per cent of the necessary right of way over which this line of railroad is to be constructed, has been given free to the company.

Applicant has submitted a detailed statement of expenses already paid to August 31, 1913, and asks that it be authorized to expend for general expenses to be incurred by the company hereafter, an amount not to exceed \$3,000.00 per month.

An analysis of the expenses paid by this company other than commissions on the sale of stock, shows that they consist generally of office rent and expenses, clerical help, [77] stenographic services, advertising, expenses and salaries of right of way agents, expenses of its directors in traveling to and from meetings and the salaries of an auditor and an engineer.

I believe that it is necessary that this company maintain an office with the usual facilities and that it employ persons to obtain rights of way. (This, however, appears to be a diminishing necessity, as the testimony is that 90 per cent of the rights of way have already been obtained.) The need of an engineer at this time where no construction is under way is not so apparent. It appears that the money

already paid out for these purposes has been honestly expended for the benefit of the company.

Sufficient showing has not been made, however, to justify a continuing expense of \$3,000.00 per month. I believe that with the exercise of economy that the expenses can be brought down to \$1,000.00 per month, and in view of the fact that this company is not building its line, but is selling stock for the purpose of building up a treasury, the greatest economy should be practiced in order that the money received from the sale of stock be available for the construction of the railroad.

Inasmuch as the directors of this company are familiar with men and conditions in the Sacramento Valley where this railroad is to be built, and where the stock is being sold, I believe it is reasonable to permit this company to take promissory notes for the sale of its stock, provided that these notes be passed upon and approved by the directors before acceptance, and that sufficient cash be realized upon said notes, without obligating the company to repay said money in the event that said promissory notes are not paid, to pay [78] all commissions of stock salesmen and the expenses of said company. This will retain intact the cash now held by this company. All promissory notes taken by salesmen should be at once delivered to the directors of the company to be passed upon and in the event of their being disapproved, to be immediately returned to the maker.

I submit herewith the following form of supplemental order:

SUPPLEMENTAL ORDER.

Application having been made to the Railroad Commission of the State of California by Sacramento Valley Electric Railroad Company for an order modifying and amending the order made herein on the 13th day of August, 1912, in the particulars set out in the foregoing opinion, and a public hearing having been held, and it appearing to the Commission that said application should be granted under the conditions in this order set out.

IT IS HEREBY ORDERED by the Railroad Commission of the State of California that the order heretofore made by this Commission herein, dated August 13, 1912, is hereby amended and modified so as to read as follows:—

ORDER.

Application having been made to the Railroad Commission of the State of California by Sacramento Valley Electric Railroad Company for an order authorizing the issue by said company of 30,000 shares par value \$3,000,000 preferred stock and 7,500 shares par value \$750,000 common stock, and authorizing applicant to sell said preferred stock at par and to pay commissions on the sale thereof of 20 per cent and authorizing the sale or exchange of said common stock for rights of way. [79]

And a hearing having been duly held and it appearing to the Commission that the money and property to be secured by the issue of said stock are necessary and reasonably required by said company for the purpose of procuring rights of way and constructing thereon the railroad as specified in said ap-

plication and exhibits attached thereto, and the purpose for which the proceeds of the issue of said stock are to be used are not in whole or in part reasonably chargeable to operating expenses or income.

IT IS HEREBY ORDERED that the Railroad Commission of the State of California does hereby authorize the issue by Sacramento Valley Electric Railroad Company of \$3,000,000 par value preferred stock and \$750,000 par value common stock.

Said preferred stock to be sold to net not less than 80 per cent of its par value to the company, provided, that said stock may be sold to be paid for in installments, said installments to be not less than \$25.00 cash per share at the time of sale, and the balance in equal installments, payable in not more than 3, 6, and 9 months thereafter. Promissory notes bearing interest at not less than six per cent per annum may be taken for the deferred payments. Provided further, that promissory notes bearing interest at not less than six per cent per annum and payable at not more than one year from their date, may be taken for the whole purchase price of said stock, but sufficient money shall be realized from such promissory notes, without obligating the company to repay the same, to pay all commissions paid on the sale of said stock, and in addition, the general expenses herein allowed to be paid by the company. Provided further, that if commissions be paid on the sale of stock they shall not exceed an amount which will yield the aforesaid 80 per cent of the par value of said stock net to the company. Commissions shall be allowed or paid only [80]

for services actually rendered in the sale of stock.

None of the said stock shall be delivered until fully paid for. All promissory notes taken for the above purposes shall be delivered immediately to the board of directors of the company to be approved or disapproved by said board. Where said promissory notes are approved a record of such approval shall be made and kept by said directors, and where said promissory notes are disapproved, the same shall be returned immediately to the makers.

Said common stock may be sold by the company under the conditions above set out for the sale of preferred stock or said common stock may be exchanged for rights of way over which said railroad is to be constructed and operated, such exchange to be made upon the basis of the fair market value of such rights of way and the par value of the common stock.

Provided that the exchange of common stock for rights of way shall not be finally consummated until \$750,000 on the sale of preferred stock shall have been paid into the treasury of the company. Proper provision, however, may be made for the conditional acquiring of said rights of way in exchange for said common stock pending final consummation of such exchange. Construction of the road shall not be entered upon nor liability created, nor money paid out except for commissions as aforesaid until there shall be in the hands of the company from the sale of stock \$750,000.

The proceeds from the sale of said preferred stock shall be used for the following purposes:

For the purchase of materials and rolling stock and the construction of an electric railroad in certain territory all as set out in detail in the application and exhibits attached thereto and filed therewith. [81]

Said company is hereby authorized to pay for general expenses, exclusive of commissions paid on the sale of stock, as set out in detail in the statements filed with this Commission, covering the period up to August 31, 1913, an amount equal to \$40,468.42. Said company shall submit for the approval of this Commission a statement similar in form to the one just above mentioned, showing general expenses incurred from said August 31, 1912, to the date of this order. From and after the date of this order, and until the further order of this Commission, said company is authorized to expend for general expenses, similar to those detailed in the statements heretofore made, and just above referred to, an amount not to exceed \$1,000.00 per month, provided that said \$1,000.00 shall not be taken from cash now in the hands of applicant, but shall be realized from promissory notes hereafter taken for the sale of stock.

Said company shall keep separate, true and accurate accounts showing the receipt and application in detail of the proceeds of the sale or exchange of said stock hereby authorized to be issued and on or before the 25th day of each month the company shall make a verified report to the Commission in accordance with the Commission's General Order No. 24, stating the sale or disposal of such stocks during

the preceding month, the terms and conditions of such sale or other disposition, the moneys or property realized therefrom and the use and application of such money or property. And in addition thereto said company shall submit to this Commission for its approval the form of all contracts for the sale or exchange of stock and before the execution [82] thereof all contracts for grading, bridging, track, including materials and labor, equipment of all kinds and all materials, labor and property involving costs in excess of \$1,000.00.

The authority hereby given to issue such stock shall apply only to stock issued by said company within the time from the 1st day of August, 1913, to the 1st day of August, 1914.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California of the State of California.

Dated at San Francisco, California, this 27th day of September, 1913.

JOHN M. ESHLEMAN,
ALEX GORDON,
MAX THELEN,
EDWIN O. EDGERTON,
Commissioners.

A true copy.

[Seal]

H. C. MATHEWSON,
Assistant Secretary Railroad Commission, State of
California. [83]

The following occurred during the examination of the witness, Huston, pp. 103, 106:

(Testimony of A. C. Huston.)

“Q. When was the first order made modifying the order of August 12, 1912?

A. September 27, 1913, was the first formal order.

The COURT.—Are you speaking now of the order of the Railroad Commission?

Mr. BLAKE.—Yes, sir. That order is in evidence.

Q. Has there been any other order since then?

A. I think so.

Q. What date, if you remember?

A. There is a subsequent order approving a lot of expenditures and authorizing the construction of the unit from the junction of the Oakland & Antioch at Rio in Solano County to the town of Dixon.

Q. I hand you here what purports to be a decision, No. 1172, reports of decisions of the Railroad Commission of California, and ask you to identify that as being the subsequent order modifying the order of August 12 and of September 27.

A. I will answer that by saying yes, with this qualification: We frequently went to the Railroad Commission with informal applications authorizing certain expenditures; whether any of them intervened between the September 27th order and this one, I cannot say, but so far as I remember now this is the next order of any importance.

Q. With reference to your going to the Railroad Commission for authority to make payments and to disburse money, did you do that after the contract upon which the payments were made had been entered into and performed in any cases?

(Testimony of A. C. Huston.)

Mr. CLARK.—I object to that as immaterial.

The COURT.—Objection overruled. [84]

A. In some instances, the Railroad Commission was consulted.

Mr. BLAKE.—Q. How consulted?

A. An informal consultation; the matter was discussed with Commissioner Edgerton and his views ascertained; I cannot recall now of our having made any contract previous to having obtained authority from the Commission.

Q. Authority in that way?

A. I don't recall any contract that we entered into that was required to go to the Commission unless we first had its consent.

The COURT.—Q. He is not talking about contracts, he is talking about expenditures, incidental expenses and things of that kind.

A. After the order of August 12th—in its terms, it did not authorize, as we thought, the expenditures of our money for current expenses; the matter was taken up by some members of the board with Mr. Edgerton, and he told them to proceed and he would ratify it afterwards.

Q. You understand, as a lawyer, that that would be entirely valueless; no one member of a board of that kind can give you any authority upon which you would be entitled to act. You might feel a moral assurance that by reason of his suggestion to you that the Commission would thereafter approve of what you had done, it would be a ratification afterwards, and not a previous authority?

(Testimony of A. C. Huston.)

A. That was the exact situation.

Q. Then you did make expenditures without the formal authority of the Railroad Commission?

A. We paid our office expenses.

Q. Had you no preliminary surveys, or anything of that kind?

A. The preliminary surveys were made before the company was incorporated; subsequent to the incorporation of the company [85] we had some additional surveys made, one, I believe, to Rio Vista, and one from Woodland to Dixon, under the express authority of the Commission.

Mr. BLAKE.—Q. I call your attention to the order contained in Volume I, Opinions and Orders of the Railroad Commission of California, at page 393, and under the designation in black type “Order” I wish you would point out to the Court what authority was actually granted to you under that order with reference to expenditures.

The COURT.—I don’t know that he need to point that out. If it is read, I suppose I can pass on it myself.

Mr. BLAKE.—I am not very familiar with its terms, myself. I believe he could pick it out quicker than I could..

The COURT.—If you want to ask his construction of it, that might be of aid to me.

Mr. BLAKE.—Q. Will you explain what the limitation upon your authority was by that order, as you construe it.

A. The first limitation of any particular conse-

(Testimony of A. C. Huston.)

quence as far as these matters are concerned, appears on page 394:

“Construction of the road shall not be entered upon nor liability created nor money paid out except for commissions as aforesaid until there shall be in the hands of the company from the sale of stock \$750,000; the proceeds from the sale of said preferred stock shall be used for the following purposes: For the purchase of materials and rolling-stock and the construction of an electric railroad in certain territory all as set out in detail in the application and exhibits attached thereto.”

My first impression and construction of that order was that so far as current expenses were incurred, we had the [86] *the* implied right to it.

The COURT.—I think your construction was correct.

A. (Continuing.) And pursuant to that construction of this order, we filed, in accordance with the rules of the Commission, a monthly statement showing our disbursements. Subsequently the question arose, and Mr. Edgerton suggested that the question could be eliminated by a formal order—

The COURT.—I think your construction is correct.

* * * * *

The COURT.—Q. Mr. Huston, how long were you a member of the board of directors of this corporation?

A. I could not say; I came in some time—a year or so.

(Testimony of A. C. Huston.)

Q. And you were a director at the time of this transaction in suit here, were you? A. Yes, sir.

Q. The members of the board of directors had always had free access to the records and files and correspondence of the company, had they not, if they demanded them?

A. I suppose so. It never was demanded, it never was denied.

Q. Don't the directors pay any attention to what is going on in the company?

A. In this particular matter, we depended upon Mr. Donohoe, who was down here all the time to keep us acquainted in all these matters, and when we met he usually came in with what was supposed to be a full report.

Q. But Mr. Donohoe's course had caused a division of sentiment in the board at that time?

A. Not with respect to keeping anything away from us; we supposed he was keeping us fully informed, and we were surprised to learn he had not.

[87]

Q. How do you ascribe to this transaction any peculiar characteristics that Mr. Donohoe should wish to keep them absolutely away from the other members of the board?

A. I can explain that to you: These matters came before the board of directors as to the stock bonus, and Mr. Reith and myself always opposed them for reasons we have stated. Mr. Donohoe figured that after the meeting of September 20th, if he brought this matter back to the board of directors to ap-

(Testimony of A. C. Huston.)

prove the payment of \$3,500 to Mr. Aston, that the board would not vote it through without the previous authority of the Railroad Commission.

Q. You are merely drawing on your surmises, not on anything that was said.

A. I have information from other members of the board.

Q. What was that information?

A. Well, as I understand from Mr. Manor, at the time they signed the contract of September 22d, he stated at that time that there is no use to put this proposition up to the board of directors, that Reith would kill it.

Q. I am asking you these questions, Mr. Huston, because as one somewhat acquainted with the practical working of institutions of this kind, and with some experience in their workings, it is very difficult for me to draw on my credulity sufficiently to believe that the board of directors did not know something of this transaction. That is not with any disposition to question your particular want of knowledge, because you were located in Woodland, and perhaps being an attorney, you did not deem it your part to look into this thing until it became a question of legal importance; but as you will readily understand as a man of business, it is a very difficult thing for one who knows anything about these things to believe that a transaction of this [88] kind could have been carried along for the period of time for which this ran without the members of the board of directors knowing more than you say they did know about it.

(Testimony of A. C. Huston.)

A. I quite agree with your Honor, and I want to add this, as long as your Honor suggested the matter: We only had two lines of business pending with our company at that time, we were doing no construction work; one was the sale of stock under the order of the Railroad Commission and the approval of notes; the other was the financing of the road. All of these persons attempted to finance the road; we thought it best to deal with one man. None of the directors lived in San Francisco. Mr. Donohoe spent a good deal of his time down here, and we left all negotiations with Mr. Donohoe, and when he would get these propositions and would get them up in shape, he would send us a message and we would come down and discuss them in the board one way or the other, and then reach whatever determination we thought best. In that way, we figured—these matters were largely left to Mr. Donohoe; I would say this, that practically all—in fact all these matters were left to Mr. Donohoe, and with these exceptions—well, during all the time we assumed we were getting all the information. Mr. Donohoe—commencing probably in the early summer of 1913, at a time when he was entertaining a proposition for Mr. Helm and when Mr. Reith and the rest of us would not stand for it because they wanted too much stock, it was from that time on that—

I want to add this, that Mr. Donohoe stated always at all sessions of the board, 'I will never make any

contract until I submit it to the board and we all agree on it.' '' [89]

That another and further supplemental order to the foregoing relative to the defendant company, made by said Railroad Commission on the 30th day of December, 1913, was received in evidence and is as follows:

[Order of Railroad Commission, December 30, 1913.]

APPLICATION No. 75.

Decided December 30, 1913.

Supplemental order, authorizing applicant (1) to issue certain preferred stock of the par value of \$3,159.55, in payment of expenses previously incurred; (2) to construct the first unit of its line from Dixon to a point of connection with the Oakland, Antioch and Eastern Railway; (3) increasing applicant's monthly allowance for current expenses from \$1,000.00 to \$1,250.00 per month.

Arthur C. Huston, for Applicant [90]

In the supplemental order of September 27, 1913, applicant was ordered to file a detailed statement of unpaid obligations not included in the statement of expenses covering the period up to August 31, 1913. Such detailed statement has now been made, showing a total of \$1,647.49, and request is made that the amounts therein contained be allowed to be paid. An examination of these items shows that they are proper items of expense, and therefore should be allowed.

Prior to and for a time after the incorporation of applicant, certain men were active in the promotion of the railroad project for which applicant was in-

corporated. During such activity they expended, on behalf of the project, various sums, totaling \$3,159.55, which they now ask this Commission to allow applicant to pay in par of preferred stock.

It is evident that these men did expend from their own resources the amounts named, and the evidence shows that the board of directors of applicant has allowed these various sums as constituting obligations in favor of these men. Therefore, I think this request should be granted and applicant be authorized to issue preferred stock at par in settlement.

Application is now made to permit the building of one unit of electric railroad, 12½ miles in length, between the town of Dixon, Solano County, California, and a connection with the Oakland, Antioch and Eastern Railway due south of Dixon.

The original order herein contained the following provision:

“Construction of the railroad shall not be entered upon, nor liability created, nor money paid out, except for commissions as aforesaid until there shall be in the hands of the company from the sale of stock \$750,000.”

The evidence shows that on December 1st there was in the hands of applicant from the sale of stock, \$93,144, and [91] *and* not to exceed \$1,000.00 has been expended since; and approved bankable promissory notes of the face value of \$211,261.55. Application is now made to modify the original order herein so as to permit the building at this time of the unit of road above mentioned, notwithstanding that there is not in the hands of applicant from the sale

of stock \$750,000.00. The estimate of cost for the construction of this unit is as follows:

Grading, 115,500 cubic yards	
at.....	\$23,100.00
Trestles, 450 lineal feet at \$12 ..	5,400.00
Culverts, 1,200 lineal feet at \$3..	3,600.00
Track construction, 121½ miles at	
\$10,600.....	132,300.00
Road crossings, 15 miles at \$100.	1,500.00
Fence, 13 miles at \$300.....	3,900.00
Overhead, 121½ miles at \$3,000.	37,500.00
	<hr/>
	\$207,300.00
Contingencies, engineering, gen-	
eral expenses, etc., 10 per	
cent.....	20,700.00
	<hr/>
	\$228,000.00
	<hr/>

Equipment, 2 motors and 1 trailer..	37,000.00
	<hr/>
	\$265,000.00

The last item of equipment—two motors and one trailer, \$37,000.00, may be eliminated by reason of an arrangement with an existing road, whereby the equipment of the latter will be used in operation over this unit.

The evidence shows that this unit will run through a well-settled community, and that with the possibilities for freight and passenger traffic there is a reasonable probability of the successful operation of this unit, especially if favorable traffic arrangement can be made with the railroad with which it con-

nects. Applicant's officers state that they propose to have a definite, binding arrangement by which they can dispose of the \$211,261.55 of notes now on hand before the entering into of any contract for the construction of this road so that with the cash now on hand and the cash to be received from these [92] notes there will be no question of the ability to pay for the construction work as it proceeds.

The cash now in the hands of applicant is drawing no interest and in view of the fact that the unit of road to be constructed can be operated before the completion of this whole railroad project, I believe this application should be granted.

Applicant has secured contracts for all of the rights of way of this 12½ miles of road, except 2 miles thereof, and the testimony shows that the balance of this right of way will be acquired at a cost not to exceed \$3,000.00.

Applicant requests permission to expend the following:

For surveying located line between the town of Dixon south to connection with the Oakland, Antioch and Eastern Railway..	\$700.00
For a similar survey from Dixon to Woodland.....	1,300.00
For standard plans for road, track, trestles, culverts, fences, overhead construction, etc., specifications to be used with contracts for grading, trestles, culverts, overhead fences, ties and rail..	500.00

It appears that the foregoing items are proper to be expended for the services and data to be obtained therefor, and I recommend that they be allowed.

I submit herewith the following form of order:

SECOND SUPPLEMENTAL ORDER.

Application having been made by Sacramento Valley Electric Railroad Company for an order modifying the orders heretofore made herein, in certain particulars, and a hearing been had and it appearing to the Commission that said application should be granted,

IT IS HEREBY ORDERED, that the orders heretofore made herein are modified to the following extent:

Sacramento Valley Electric Railroad Company is hereby authorized to pay off and discharge those certain items of indebtedness [93] as shown in detail on page 4 of the application filed with this Commission on October 27, 1913, and to expend for current expenses a sum not to exceed \$1,250.00 per month, provided that said expenses shall be paid from the proceeds of any notes in the possession of applicant, and to make in addition the following expenditures:

1. For surveying located line from the town of Dixon south to connection with the Oakland, Antioch and Eastern Railway, \$700.00;

2. For a similar survey between the towns of Dixon and Woodland, \$1,300.00;

3. For standard plans for road, track, trestles, culverts, fences, overhead construction, etc., speci-

cations to be used for grading, trestles, culverts, overhead fences, ties and rails, \$500.00.

Applicant is hereby further authorized to construct its road between the town of Dixon due south to a connection with the Oakland, Antioch and Eastern Railway, at a cost not to exceed the following estimate:

Grading, 115,500 cubic yards	
at 20 cents.....	\$23,100.00
Trestles, 450 lineal feet at \$12..	5,400.00
Culverts, 1,200 lineal feet at \$3,	3,600.00
Track construction, 12 $\frac{1}{2}$ miles	
at \$10,600.....	132,300.00
Road crossings, 15 miles at	
\$100.....	1,500.00
Fence, 13 miles at \$300.....	3,900.00
Overhead, 12 $\frac{1}{2}$ miles at \$3,000.	37,500.00
	<hr/>
	\$207,300.00
Contingencies, engineering,	
general expenses, etc., 10 per	
cent.....	20,700.00
	<hr/>
	\$228,000.00
Equipment, 2 motors and 1	
trailer	37,000.00
	<hr/>
	\$265,000.00

Provided, however, that before entering into any contract of \$1,000.00 or more, for the construction of said road or [94] for the acquisition of materials or service therefore, such contract shall be

submitted to and obtain the approval of this Commission.

Sacramento Valley Electric Railroad is further authorized to issue preferred stock at par to the following persons in the amount set opposite their names, to wit:

C. L. Donohoe, president, to Sept. 30, 1912.....	\$1,287.15
C. L. Donohoe, president, October, 1912.....	129.00
L. P. Klemmer, director, from June 11, 1911, to November, 1912.....	207.90
H. W. Manor, vice-president....	190.00
J. Reith, Jr., treasurer, from April, 1911, to September, 1912.....	665.05
E. L. Sisson, secretary, from April, 1912, to September, 1912.....	425.50
A. C. Huston, attorney, from April, 1911, to September, 1912.	254.75

Provided, that immediately upon the issue of such stock said persons shall give to said company receipts in full for the above amounts. Except in the particulars herein in this order named, all existing orders herein shall remain in full force and effect.

The foregoing second supplemental opinion and order are hereby approved and ordered filed as the second supplemental opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 30th day of December, 1913. [95]

The evidence showed the foregoing were the only

orders made by said Railroad Commission relating to the issuance of its stock by defendant or the use of the proceeds thereof.

A. C. Huston further testified on his cross-examination:

“Mr. BLAKE.—Q. At the time that this order was made, their (referring to the company, defendant) only source of income from any quarter was the sale of this stock?

A. That was the only source of income we (referring to the company, defendant) have ever had.”

A. C. Huston further testified on his redirect examination:

“Mr. CLARK.—Q. Some reference was made to a sum of \$750,000 in the treasury before the company could proceed to do certain work or incur certain obligations; was that \$750,000 in the treasury from the source designated in the Commission’s order?

A. We never have had that amount at any time.”

Judgment was entered herein on May 10, 1915.

[Order Settling and Allowing Bill of Exceptions.]

WHEREUPON, the Court, being willing that a record of the proceedings should be made in said cause, in order that the same may be reviewed for errors, if any there be, now hereby certifies that the foregoing bill of exceptions contains all of the evidence in the cause relating to the question presented by the exceptions noted by the defendant, the defendant making no point that the evidence is insufficient to sustain the finding that the contract relied on was entered into and breached as pleaded in the complaint in the first count, but claiming and

reserving the point that the contract was illegal and not authorized by the order of the Railroad Commission, and said bill of exceptions is full, true and correct; the Court further certifies [96] that the said bill of exceptions was presented within the time allowed by this Court and by law, for the filing and presentation of the same, and said bill of exceptions is hereby settled and allowed.

Dated, September 21st, 1915.

WM. C. VAN FLEET,
Judge.

[Stipulation as to Bill of Exceptions.]

The foregoing bill of exceptions is correct and it is agreed the same may be settled and allowed in accordance with the certificate thereto attached.

BLACK & CLARK,
A. C. HUSTON,
Attys. for Plff. in Error.
JACOB M. BLAKE,
Atty. for Deft. in Error. [97]

[Title of Court and Cause.]

Assignment of Errors.

The defendant in this action, in connection with its petition for writ of error, makes the following assignment of errors, which he avers occurred on the trial of this action:

1. The Court erred in refusing to determine and find that defendant could expend its funds for only such purposes as were directed or permitted by the orders of the Railroad Commission of the State of

California; that, at a time alleged in the complaint, defendant did not have legal authority and was not authorized to make the contract alleged in the complaint or to employ plaintiff to render services or to agree to pay him the sums alleged in the complaint; and that, under and by virtue of the orders of the said Railroad Commission controlling the disbursement and expenditure of the funds of defendant, its funds could not be legally applied in payment of the obligations mentioned in the complaint and that the plaintiff was not entitled to recover for said reasons. [99]

2. The Court erred in its refusal to find and determine said matters and the Court erred in its refusal to determine for said reasons that the plaintiff was not entitled to recover in this action.

3. The Court erred in determining that the plaintiff was entitled to any judgment.

4. The Court erred in refusing to find and determine that, under and by virtue of the laws of the State of California, defendant was, at all times mentioned in the complaint, and ever since has been, and now is, under the jurisdiction of the Railroad Commission of the State of California, to the extent that it was, and is, only authorized to enter into such contracts for the expenditure of its funds and to make only such expenditure from its funds as were, and are, directed, permitted, or authorized by the said Railroad Commission of said state.

5. The Court erred in refusing to find and determine that, at all times alleged in plaintiff's complaint, defendant was not authorized and did not

have the legal authority or any capacity, right or power to make or enter into the alleged contract with plaintiff or to employ plaintiff to render the alleged services or to pay plaintiff any of the sums mentioned in plaintiff's complaint.

6. The Court erred in refusing to find and determine that, under and by virtue of the orders of the Railroad Commission of the State of California governing and controlling the disbursement and expenditure of the funds of defendant, none of said funds could be legally applied to the payment of the obligations alleged in the complaint. [100]

7. The Court erred in refusing to find and determine that it is true that defendant had no legal capacity or authority to make or enter into the contract alleged in the first cause of action or to make or enter into any of the agreements alleged in the complaint.

8. The Court erred in refusing to find and determine that plaintiff take nothing and that defendant is entitled to costs.

9. The Court erred in refusing to find and determine that, prior to August 13, 1912, the defendant made application to the Railroad Commission of the State of California, and that said Railroad Commission duly gave and made its order dated August 13, 1912, and which constitutes the Defendant's Exhibit "D."

10. The Court erred in refusing to find that said order last mentioned continued unmodified until the date of the order next mentioned.

11. The Court erred in refusing to find and deter-

mine that, prior to September 27, 1913, the defendant duly applied to the said Railroad Commission of the State of California for modification of said order of August 13, 1912, and that thereupon said Railroad Commission duly gave and made its order dated September 27, 1913, and which constitutes the Defendant's Exhibit "F."

12. The Court erred in refusing to find and determine that said two orders were the only orders of said Railroad Commission purporting to specify the liabilities which defendant might incur against its funds.

13. The Court erred in refusing to find and determine that said Railroad Commission made no other order relating to [101] the contract relied upon by plaintiff.

14. The Court erred in refusing to find and determine defendant never had in its hands, received from the sale of its stock, the sum of \$750,000, and that its only source of income was from the sale of its stock and that its funds constituted moneys received from the sale of its stock.

15. The Court erred in granting the judgment payable generally out of any properties of the defendant.

WHEREUPON, the defendant prays that the judgment of the District Court may be reversed.

A. C. HUSTON,

BLACK & CLARK,

Attorneys for Defendant.

[Endorsed]: Filed Jul. 7, 1915. W.B. Maling, Clerk. By J. A. Schaetzer, Deputy Clerk. [102]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States for the
Northern District of California, Second Division.*

No. 15,759.

TAGGART ASTON,

Plaintiff,

vs.

SACRAMENTO VALLEY ELECTRIC RAIL-
ROAD COMPANY, a Corporation,
Defendant.

**CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON WRIT OF ERROR.**

I, Walter B. Maling, Clerk of the District Court of the United States of America, in and for the Northern District of California, do hereby certify that the foregoing one hundred five (105) pages, numbered from 1 to 105, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$60.00; that said amount was paid by Black & Clark, Esqrs., attorneys for the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 27th day of October, A. D. 1915.

[Seal] WALTER B. MALING,
Clerk of the District Court of the United States, for
the Northern District of California.

[Ten-cent Internal Revenue Stamp. Canceled Oct.
28, 1915. W. B. M.] [106]

[Endorsed]: No. 2670. United States Circuit Court of Appeals for the Ninth Circuit. Sacramento Valley Electric Railroad Company, a Corporation, Plaintiff in Error, vs. Taggart Aston, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Filed October 27, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

No. 2670.

SACRAMENTO VALLEY ELECTRIC RAIL-
ROAD COMPANY, a Corporation,
Plaintiff in Error,
vs.

TAGGART ASTON,

Defendant in Error.

Stipulation Under Rule 23.

IT IS STIPULATED that in the printing of the transcript and record on appeal in the above-entitled cause, the following need not be printed: 1. Title of court and cause throughout, except on the complaint and judgment. 2. Verifications and endorsements except date of the filing of the complaint, answer and writ of error. 3. Summons and return. 4. Stipulation waiving jury 5. Order that judgment be entered. 6. Clerk's certificate to judgment roll. 7. Petition for writ of error. 8. Order allowing writ of error. 9. Bond. 10. Writ of error. 11. Citation on writ of error. 12. Four orders enlarging time.

IT IS STIPULATED that all of said documents have been filed, and that if defendant in error at any time desires to raise any point with regard to any one of the same, the plaintiff in error will have printed a supplemental transcript showing the same.

DATED November 16, 1915.

BLACK & CLARK and

A. C. HUSTON,

Attorneys for Plaintiff in Error.

JACOB M. BLAKE,

Attorney for Defendant in Error.

[Endorsed]: No. 2670. In the U S. Circuit Court in the District Court of Appeals, 9th Circuit of the United States. Northern District of California. Sacramento Valley Elec. R. R. Co., Plff. in Error, vs. Taggart Aston, Dft. in Error. Stipulation Under Rule 23. Filed Nov. 19, 1915. F. D. Monckton, Clerk.

